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No. 37

In the Supreme Court of the United States

OCTOBER TERM, 1954

MARION L. HOLLAND AND ETHEL E. HOLLAND,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Appeals (R. 341–352) is reported at 209 F. 2d 516.

JURISDICTION

The judgments of the Court of Appeals were entered on January 21, 1954. (R. 352.) A petition for rehearing, filed on January 29, 1954 (R. 355–373), was denied on February 5, 1954 (R. 374). By order of Mr. Justice Clark dated March 3, 1954, the time for filing a petition for a writ of certiorari was extended to and including

March 22, 1954. The petition for a writ of certiorari was filed on March 22, 1954, and granted on June 7, 1954 (R. 352). The jurisdiction of this Court rests upon 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

The petitioners were convicted of wilfully attempting to evade their income tax for the year 1948. The Government's proof of unreported net income was based upon evidence of a source of taxable income in excess of that reported and proof that the sum of increases in the petitioners' net worth and nondeductible expenditures made by them was substantially in excess of their reported net income. The questions presented are:

1. Whether a failure to show any specific inaccuracy in the petitioners' books precluded resort to a net worth-expenditures computation to prove that the petitioners had wilfully attempted to evade their taxes by failing to record and report a substantial amount of taxable income.

2. Whether the evidence was sufficient to sustain the jury's verdict.

3. Whether the trial court's instructions on the Government's burden of proof were improper.

4. Whether the trial court properly explained to the jury the nature of circumstantial evidence, and whether it was required to give a specific instruction, in addition to the usual instruction on reasonable doubt, that the petitioners should

be acquitted if the circumstantial evidence was not such as to exclude every reasonable hypothesis except that of guilt.

5. Whether the trial court's instructions adequately explained to the jury the essential elements of the offense charged.

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

> SEC. 41. GENERAL RULE.
>
> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. * * *
>
> (26 U. S. C. 1952 ed., Sec. 41.)
>
> SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.
>
> (a) [as amended by Section 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687]

General Rule.—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

(26 U. S. C. 1952 ed., Sec. 42.)

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. * * *

(26 U. S. C. 1952 ed., Sec. 43.)

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer.*—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * *

(26 U. S. C. 1952 ed., Sec. 54.)

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.41–1. *Computation of Net Income.*—* * * The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be fol-

lowed with respect to the time as of which items of gross income and deductions are to be accounted for. * * *

* * * * *

SEC. 29.54-1. *Records and Income Tax Forms.*—Every person subject to the tax, except persons whose gross income (1) consists solely of salary, wages, or similar compensation for personal services rendered, or (2) arises solely from the business of growing and selling products of the soil, shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1. * * *

STATEMENT

On May 12, 1952, a three-count indictment was filed in the United States District Court for the District of Colorado, charging violations of Section 145 (b) of the Internal Revenue Code. The first and second counts charged that the petitioner Marion L. Holland had attempted to evade income taxes for the years 1946 and 1947 by underreporting his net income in the amounts of $23,134.10 and $28,914.40, respectively.[1] The third count

[1] The case was consolidated for trial with another in which a two-count indictment charged that the petitioner Ethel E. Holland had aided and abetted Marion L. Holland in such

alleged that both petitioners, Marion L. and Ethel E. Holland (husband and wife), had attempted to evade and defeat income tax due and owing by them for the year 1948 by underreporting their net income for that year in the amount of $19,736.74. (R. 7–9.) Upon arraignment, the petitioners pleaded not guilty. (R. 9.) They were tried by a jury which found both petitioners guilty on Count 3 (involving the year 1948) and the petitioner Marion L. Holland not guilty on Counts 1 and 2 (involving the years 1946 and 1947). (R. 12.) Judgments of conviction were entered on April 22, 1953; the petitioner Marion L. Holland was sentenced to imprisonment for two years and fined $10,000, and the petitioner Ethel E. Holland was fined $5,000. (R. 12–13.) The judgments were affirmed unanimously by the United States Court of Appeals for the Tenth Circuit. (R. 341–351.)

To prove its case, the Government undertook to show (1) that petitioners had acquired a hotel early in 1946, the first year covered by the indictment, and that the profits from this source had greatly exceeded those petitioners reported; (2) that petitioners' net worth during the indictment period had increased annually by an amount much

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attempted evasion of income taxes for the years 1946 and 1947. (R. 10–11.) The petitioner Ethel E. Holland was acquitted on both counts of that indictment, as was Marion on the two counts of the present indictment covering the same years. (R. 12.)

larger than the amount they had reported as income; and (3) that the increases in net worth, falsely represented by petitioners as reflecting only a prior accumulation of undeposited cash kept in suitcases and similar receptacles, could reasonably be attributed only to unreported taxable income. The details of this proof may be summarized as follows:

I. THE SOURCE OF UNREPORTED INCOME

The evidence showed that in 1946 a profitable hotel, bar and restaurant business was acquired by the Hollands and that, although in 1947—according to Mr. Holland's own statement to the former owner—the business and its earnings had substantially increased, the Hollands nevertheless reported much less annual income from the business than it had been earning.

For some time prior to April 1, 1946, Mr. Holland, assisted by Mrs. Holland, was employed by Leonard DeLue as chef at the La Ray Hotel (later called the Holland House) in Golden, Colorado. (R. 33–34.) For these services Mr. Holland received 25% of the net profit from the restaurant business, which comprised about two-thirds of the business of the combined hotel, bar and restaurant operation. (R. 34, 38.)[7] As

[7] Though he worked under the same arrangement with DeLue from January to April 1, 1946, when the Hollands took over the hotel, Mr. Holland reported none of the income realized for this work in his return for 1946 (R. 233).

salary for a period of approximately six months in 1945 (May 20–November 15), Mr. Holland received $4,221.42 (R. 39, 291), which would indicate a total profit from the entire business of $25,300, or approximately $4,220 per month.[3]

On April 1, 1946, Mr. Holland purchased the hotel, including the restaurant and bar, and took over their operation. (R. 34.) At the trial Mr. DeLue, the former owner, testified that his net income from the business for the first three months of 1946 was $11,230.17, an average of approximately $3,743 per month. (R. 36.) Mr. DeLue further testified that in February 1947,[4] Mr. Holland told him that the business had doubled and had already netted $50,000, the amount Holland had originally offered to pay DeLue for a one-half interest. (R. 35.)

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[3] On the basis of Mr. Holland's receipts on his 25% arrangement, the net restaurant profits were $16,885. This figure was about two-thirds of the profits of the business as a whole, which would place the total profits at about $25,300 for the six-month period.

[4] Mr. DeLue also testified that due to the opening of another bar in the vicinity some time around July 1946, the bar business decreased, but that, as previously mentioned, the income from this source had represented only about one-third of the total income from the combined hotel, bar and restaurant operation. (R. 38, 40.) See also the sample daily cash report for February 1953. (R. 354.) In a formal interview during the investigation of the Hollands' income tax liability, Mr. Holland stated in effect that the business went down for a while in 1946 and then picked up, and that he thought, although he did not know, that it was in 1947 that it picked up. (R. 329.)

In their income tax returns for the years 1946, 1947 and 1948,[3] the Hollands reported net profits from the hotel, bar and restaurant business in the amounts of $4,196.82, $5,407.86 and $11,885.45, respectively, an average of approximately $466 per month for the last nine months of 1946, $450 per month for 1947, and $990 per month for 1948. (R. 235, 243, 253.) This was approximately 12½% for 1946, 12% for 1947, and 26% for 1948 of the net profits which Mr. DeLue testified he had previously realized from the same source.

The books of the hotel business were kept by an accountant, Dwight Dulaigh, from data furnished him at monthly intervals by the Hollands. (R. 152, 153.) These data, prepared by Mrs. Holland, consisted of daily figures for cash receipts and cash disbursements, together with evidence of business expenditures in the form of receipted bills and check stubs. (R. 153, 154.) No record was kept of amounts withdrawn by the Hollands for personal and living expenses, and, after preparing the daily figures, Mrs. Holland destroyed the cash register tapes. (R. 75, 78, 313, 324, 325.) At the trial Mr. Dulaigh testified that he accepted what Mr. and Mrs. Holland told him and that he

[3] Individual returns were filed by Mr. Holland (with Mrs. Holland shown as a dependent) for the years 1946 and 1947; a joint return was filed by Mr. and Mrs. Holland for the year 1948. (R. 233, 241, 251.)

did not have any check on the authenticity of the figures.[6] (R. 155.)

The Government's agents were similarly unable to check directly the accuracy of the figures underlying the returns, which showed the earnings of the hotel after the Hollands' acquisition to be only one-eighth to one-quarter as much as they had been immediately before. Accordingly, the investigators proceeded to reconstruct the Hollands' net income by establishing the annual increases in their net worth plus their nondeductible expenditures for each year.

II. THE NET WORTH INCREASES AND PETITIONERS' FALSE EXPLANATION

The Government's proof of the large annual increases in petitioners' wealth is summarized in tabular form, with supporting record references for each item, in the Appendix, *infra*, pp. 89–91.[7]

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[6] In an interview during the investigation of his income tax liability Mr. Holland told the investigating officers that Mr. Dulaigh did not know anything about his affairs except what the books showed, and requested that the officers discuss things not on the books with him, Mr. Holland, personally. (R. 81, 335.)

[7] Though it is not reproduced in the record, a chart identical in all substantial respects with the one in the Appendix to this brief was used by the prosecutor in summarizing the evidence for the jury (cf. R. 199–203). As we do, petitioners refer (Br. 6–7) to the figures used in this summation and shown in our Appendix. The Government attempted to present the same computations based on the evidence through an expert witness; sustaining a defense objection to this effort,

Beginning with a net worth of $19,152.59 at the end of 1945, the evidence showed annual increases in net worth plus nondeductible expenditures totaling (after deducting items of nontaxable income) $46,442.50 for 1946, $33,790.25 for 1947, and $32,047.16 for 1948.* In contrast with these figures, petitioners had reported as their net income $15,336.93 for 1946 (R. 235–A), $5,717.57 for 1947 (R. 247), and $10,211.42 for 1948 (R. 257). In other words, their undisputed acquisitions and

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the trial court told the prosecutor he could state these results in his arguments to the jury (R. 161–169), and this was the procedure ultimately followed.

* Analysis of the annual sums of net worth increase and nondeductible expenditures reveals a significant relationship between these sums, the income petitioners reported from their hotel business, and the income the hotel had earned just prior to petitioners' acquisition of it. Eliminating from petitioners' annual acquisitions of wealth the effect of the income or loss the Hollands reported from sources other than the hotel, bar and restaurant business—i. e., income from other sources of $11,640.11 in 1946 (R. 235), similar income of $809.71 in 1947 (R. 243), and a loss from such other sources of $674.03 in 1948 (R. 253)—the sums remaining are $34,802.39 for 1946, $32,980.54 for 1947, and $32,721.19 for 1948. Stated as monthly averages, these sums would represent $3,866 per month for the last nine months of 1946, $2,748 per month for 1947, and $2,726 per month for 1948. And these last figures, stated as a percentage of the income the former owner had realized from the hotel, restaurant, and bar business, would be 103% of that income for 1946, 73% for 1947, and 73% for 1948. As noted above, on the other hand, the income petitioners reported for the same business was 12½% for 1946, 12% for 1947, and 26% for 1948 of that the business had produced before they acquired it.

expenditures for the three-year period exceeded by $81,000 the total of their reported net income.

As petitioners acknowledge (Br. 45), there is no dispute as to the large total of acquisitions and expenditures they were proved to have made for the years 1946, 1947, and 1948. The critical question posed by their explanations before indictment and contested at their trial was whether these sums, alleged to show unreported income, were actually brought forth from a store of $113,000 in undeposited currency practically all of which had been accumulated long before the prosecution years. Briefly stated, the question was whether petitioners' net worth at the starting point of the computations had been established with substantial accuracy. The remainder of this Statement concerns largely the evidence bearing on this issue.

A. PETITIONERS' STATEMENTS

Called as a witness for the Government, Special Agent Bodley testified to conversations with the Hollands on three different occasions during the investigation of their income tax returns—informal interviews with Mr. Holland on September 14 and September 20, 1949, and formal interviews with both Mr. and Mrs. Holland on October 25, 1949, when their statements were transcribed and signed and sworn by them. During cross-examination of Bodley, the reporter's transcript of the formal statements on October

25, 1949, and Bodley's memorandum of the interview on September 14, 1949, were introduced in evidence as defendants' exhibits. (R. 69–84, 87–88, 97, 300–333, 334–335.)

At the interview on September 20, 1949, Mr. Holland told the investigating officers that his assets just prior to the purchase of the hotel on April 1, 1946, totalled $158,000, consisting of three items—$104,000 in currency which he had amassed prior to December 22, 1933, $9,000 which he and his wife had saved between 1933 and 1946, and $45,000 which he had derived from the sale of stocks early in 1946 (R. 82). At the formal interview on October 25, 1949, Mr. Holland gave a similar account of his financial affairs. After being advised of his constitutional rights and that anything he said might be used against him, he stated under oath that his assets as of January 1, 1946, the starting point of the Government's net worth computation, amounted to $157,000. Again, he said that $104,000 of this was undeposited currency saved prior to December 22, 1933, $9,000 was undeposited currency saved between 1933 and 1946, and the remainder represented cash realized from the sale of stocks before the purchase of the hotel. (R. 70–73, 300, 301–303, 306.) Similarly, Mrs. Holland stated that they had accumulated $104,000 in currency by 1933 and that the hoard was augmented between 1933 and 1946, though she was unable to state the amount of this increase (R. 79, 328–330).

According to the Hollands' statements, their accumulation of undeposited cash, reaching $104,000 by 1933 and $113,000 by 1946, had been begun by Mr. Holland some time before 1917. During the intervening years, he said, it was kept at different times in various receptacles—in a safe deposit box, in a metal box, in a suitcase, in a canvas bag. Mr. Holland said it was left at home (in Denver) while he was away working in Seattle, that it was in "various places" while he was away working in Casper, Wyoming, that he and his wife had it with them while they lived in a rented room in Billings, Montana, and that they also kept it with them (in a suitcase) while they were later living in various hotels in Denver. (R. 82–83, 84, 302, 308–310.) See pp. 19–20, *infra*.

Mr. Holland further stated that in 1946 (the first indictment year), when he purchased the hotel, he began to draw upon the theretofore untouched hoard of currency. He said that by the end of 1948, the last of the prosecution years, the sum had been reduced to $30,000, the remaining $83,000 having been consumed for the expenditures and acquisitions later established for the 1946–1948 period by the Government's proof. (R. 84, 305–306, 310, 311, 334.) This figure of $83,000, if truthfully derived, explained precisely the $81,000 by which the Hollands' expenditures from 1946 through 1948 had exceeded their reported income. *Supra*, pp. 12–13.

As noted above, the only other assets Mr. Holland claimed to have had on January 1, 1946, were stocks worth about $45,000. When asked whether he had sold all of these stocks before purchasing the hotel in April of 1946, he said "Yes," then added, "I'd like to correct that to I don't know. I'm not sure." Immediately thereafter, however, he stated that he owned no securities as of that time (October 25, 1949) and had owned none for the preceding two or three years, not having "fooled with the stock market" since his acquisition of the hotel business. (R. 302.)

B. THE EVIDENCE DISCLOSED BY FURTHER INVESTIGATION

Mr. Holland's tax return for 1946 reported his sale in February 1946 for about $50,000 of stocks which had had a cost to him of $29,650 (R. 239). Having checked all Denver brokerage houses on Holland's stock purchases and sales, Agent Bodley testified that Holland had on January 1, 1946, stocks costing $26,000 or $27,000 (R. 95–96). An official of the bank with which Holland had for some years placed his stocks as collateral for loans testified that all such collateral was withdrawn before April of 1946 and that subsequent loans were secured by other types of assets (R. 29–30). And petitioner's tax returns, which reported dividends and interest for the years 1944 and 1945, reported no dividends thereafter (R. 233, 241, 251, 287, 291). These items of evidence coincided closely with Holland's

statements as to his stock holdings on January 1, 1946 (*supra*, pp. 14, 16).[9]

Similarly, Holland's statement that he had only one liability on January 1, 1946, a debt owed the United States National Bank of Denver (R. 303), was substantially confirmed by the independent evidence. An officer of that bank testified that Holland owed it $11,703.84 at the end of 1945 (R. 26), and the only other liabilities proved by the independent evidence for this date totalled about $950 (R. 102, 112, 139, Appendix, *infra*, p. 90).

There remained the crucial statements as to the $113,000 in undeposited currency which, if truthful, explained the net worth increases for the years 1946 through 1948. The Government undertook to prove that these statements were false by (1) evidence of petitioners' financial history culminating in business failure and unpaid obligations in 1933, (2) evidence of petitioners' limited earnings from 1933 to 1946, (3) evidence of their income tax reporting history, and (4) evidence of the nature of their expenditures after acquiring the hotel, tending to show a current source of income rather than a prior accumulation of cash.

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[9] Listing several thousand shares of stock (Br. 9), petitioners speak of these as representing security for Holland's loans at the end of 1945. The evidence, including that to which they refer, however (R. 26-30), shows that the pledges in question, dating back to 1942, were periodically changed; Holland was buying *and selling* the various stocks on margin

1. *Events culminating in business failure in 1933.*—Mr. Holland started in the restaurant business in Denver in 1921. Two years later he moved to another location. In 1926 he incorporated the business as the Holland Cafe Company, thereafter reincorporating, first as The Pine Grove Cafe Company, and later as The Rocky Mountain Restaurant Company. Mr. Holland said that when his obligations became too great or the suits against him too numerous in the period prior to 1933, he formed new corporations to get a new start.[10] (R. 75, 314–315, 316.) His correspondence with creditors in 1928 and 1929 confirmed his financial difficulty (R. 267–270), a letter to one creditor who had apparently threatened suit stating (R. 270):

> My loss will be even greater when you start this suit. It will be a complete loss for me. It means my $60,000.00 capital investment which is everything I have in the world.

In December 1933, the Hollands suffered a business failure and abandoned their restaurant business to creditors. (R. 75, 76, 315, 316.)

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[10] Mr. Holland stated that he owned all the stock of such corporations except directors' qualifying shares and that he controlled the corporations as completely as he had controlled his individual business. (R. 75, 315.) He further stated that with the exception of a dairy bill, no payment on debts for which the corporations were liable was made subsequent to 1933. (R. 303.)

In 1937 or 1938, while working in Casper, Wyoming, Mr. Holland, using the name "Francis Monroe" to avoid creditors, had an account and safe deposit box with the Wyoming National Bank from which he borrowed money to buy stock on margin. At that time Mr. Holland told the cashier of the bank that he had gone broke in the restaurant business in Denver; that he had very little money and some debts remaining from the business; and that he would like to attempt some business ventures but did not have the money to do so. (R. 127.)

Furniture which the Hollands purchased on the installment plan in 1933, when they later asserted they had over $100,000 in undeposited cash, was repossessed in December of that year with an unpaid balance of $92.20. (R. 103–104.) The Hollands had an unpaid dairy bill dating from 1933 on which they made a compromise payment in 1946. (R. 105, 303, 311.) A judgment of $506.66 against Holland for delinquent business rent for the year 1930 remained unpaid until 1950. (R. 112, 139.)

2. *Earnings and work history, 1933–1946.*— After abandoning his restaurant business in Denver, Colorado, in 1933, Mr. Holland sold vacuum cleaners for about six months. In 1934 he went to Casper, Wyoming, where he worked at the Townsend Hotel for seven years at a salary of $175 per month; his wife and son remained in

Denver during these seven years because it was to their "economical advantage to remain under those conditions." During this period Mrs. Holland worked (for approximately $2,000 per annum) and maintained a home for herself and the Hollands' son with her niece, who carried half the expense of the house. In 1941, Mr. Holland returned to Denver and worked as chef at the Golden Lantern restaurant for about five or six months. He then went to Orange, Texas, where he worked as chef or steward at the shipyards for a short time. In 1942 he went to Billings, Montana, where he worked as manager, chef or steward at a restaurant until April 1945. He then returned to Denver, and, after living at several different places, went to work at the La Ray Hotel in Golden, Colorado, on May 1, 1945, where he worked until November 15 of that year. He returned to the La Ray Hotel early in 1946, and worked there until he purchased the hotel on April 1, 1946. (R. 75–76, 78, 317–319, 327.) During the period 1937–1939 and in 1941, Mr. Holland obtained a number of small loans ranging from $200 to $2,000. (R. 102, 130–131.)

3. *Income tax records.*—During the investigation of his income tax liability, Mr. Holland stated under oath that the $104,000, which he allegedly had on hand in December 1933, represented his savings, mostly accumulated through the twenties; that he had paid the tax on it; that he started fil-

ing income tax returns in 1921; and that all of his returns had been filed in Colorado, Wyoming or Montana. (R. 308, 313.)

However, the official records of the District Director of Internal Revenue for the State of Colorado showed no income taxes paid by the Hollands from 1913 to 1940, inclusive, and that nontaxable returns only were filed for the years 1920, 1921 and 1926. Those records also showed no income taxes paid by the Holland Cafe, Pine Grove Cafe and Rocky Mountain Restaurant Company for the years 1926 through 1934, inclusive, and that nontaxable returns only were filed for 1926–1930, 1931 and 1932. (R. 271, 273, 275, 277, 279.) The official records of the District Director of Internal Revenue for the State of Wyoming showed the amount of income taxes paid by the Hollands from 1933 to 1941 to be: $22.26, including interest and penalties, for 1935; $31.48, including interest and penalties, for 1936; $30.44 for 1938; $26.64 for 1939; and $46.59 for 1940. (R. 281, 283, 285.) The official records of the District Director of Internal Revenue for the State of Montana showed payment of income taxes by the Hollands in the amount of $874.06 for 1944 and $1,360.67 for 1945. (R. 287, 291.)

4. *Nature of expenditures, 1946–1948.*—It was not until after the Hollands acquired the hotel in April, 1946, that they allegedly began to spend the undeposited cash fund they claimed to have

kept intact for decades before (R. 71, 79, 81, 82–83, 310).[11]

During the period from the purchase of the hotel in April 1946 through 1948, however, many acquisitions of property and reductions of indebtedness by [illegible] Hollands were characterized by installment payments, indicative of a source of current income rather than a huge reservoir of cash available without the payment of interest. Thus, a coffee shop costing $15,000 was purchased with payments of $5,000 in May 1946, and $10,000 in February 1947 (R. 35); a house costing $10,000 was purchased with payments of $6,000 in October 1946, and $4,000 in March 1947 (R. 46–47); another house and lot costing $7,500 were purchased with payments of $3,500 in May 1947, and $100 per month thereafter (with the exception of $200 in July 1948) until paid in full (R. 63, 67, 155–156); 160 acres of ranch land costing $6,000 were purchased with payments of $2,000 in January 1948, and $4,000 in August 1948 (R. 59, 263, 264); an indebtedness to a bank in the amount of $35,000 was discharged with payments of $2,500 in July 1946, $7,500 in August 1946, $2,500 in February 1947, $2,500 in June 1947, $2,500 in September

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[11] Mr. Holland described the alleged cash fund as being wholly (R. 82–83) or mostly (R. 73, 308–309) in $100 denominations. Persons to whom Mr. Holland made substantial cash payments during the period, however, testified that those payments were mostly in denominations smaller than $100 bills. (R. 47, 50, 51, 55, 64.)

1947, $2,500 in October 1947, and $15,000 in February 1948 (R. 297).

III. THE DEFENSE

In his opening statement to the jury, defense counsel argued at length that the evidence would show an accumulation of undeposited currency by the Hollands exceeding $100,000 by 1933 and growing to about $113,000 by 1946 (Tr. 12–19).[12] The defense stressed this theory on cross-examination of one of the Special Agents to whom the Hollands had made their sworn written statements (R. 84, 86–87, 91, 93–99), introducing these statements as defense exhibits (R. 87, 300–333), and in arguing their motion for acquittal (R. 177) on the ground that the starting point, the "cornerstone of this entire case" (R. 186), had not been adequately established. The petitioners did not take the witness stand, and the defense rested after presenting three character witnesses (R. 193–197).

SUMMARY OF ARGUMENT

I

Prosecutions for attempted tax evasion employing the so-called "net worth" method of proof have been approved by this Court (*United*

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[12] The reference is to the reporter's typewritten transcript which, at our request, has been certified to this Court by the Clerk of the Court of Appeals. The opening statements are not reproduced in the printed record.

States v. *Johnson*, 319 U. S. 503) as well as every Court of Appeals which has considered them. The basic rules of criminal evidence and procedure are as applicable in these cases as in any others. The Government claims no special "assumptions" or "presumptions" to take the place of proof. Nor is there ground for the view, on the other hand, that attempts to evade taxes, unlike other crimes, must be proved not only beyond a reasonable doubt but to a mathematical certainty. *United States* v. *Johnson*, *supra*, at 518; *Hopt* v. *Utah*, 120 U. S. 430, 439–440.

II

No special statutory authorization is required for use of circumstantial evidence to prove criminal guilt. No such authorization is necessary to prove attempted tax evasion by the net worth method.

The fact that there was no direct evidence of specific false statements in petitioners' books was no bar to proof of the crime by showing net worth increases which could reasonably have come only from unreported income. The result of the Government's proof was to show precisely that the books were false in the crucial sense that they understated taxable income. Nor was Section 41 of the 1939 Internal Revenue Code a bar to the net worth method. Section 41, referring to "method[s] of accounting," and authorizing the Commissioner to change such methods where they

do "not clearly reflect the income," is concerned with the taxpayer's "general bookkeeping system" and not with the truth or accuracy of entries in the books. *United States* v. *American Can Co.*, 280 U. S. 412, 419. The net worth method of proof may be employed no matter what "general bookkeeping system" the taxpayer follows, and entails no "change" in the system. The taxpayer's method of accounting may be perfectly appropriate as a method and not subject to change by the Commissioner; the question remains whether, though using a proper method, the taxpayer has made false entries in his books and false tax returns. Undertaking to answer this question, the net worth method of proof need not be preceded by an irrelevant showing that the defendant's "method of accounting" is inadequate.

III

The jury's verdict, sustained by two courts, was wholly justified by the evidence. It was proved that petitioners acquired a hotel early in 1946 which had been producing earnings far larger than those they reported; that petitioner Marion Holland, contrary to his tax returns, said these earnings increased rather than declined after their purchase; that petitioners' acquisitions of assets and other expenditures from 1946 through 1948 exceeded by huge amounts their reported income; that the discrepancy was remarkably similar to the difference between the hotel earnings they re-

ported and the earnings the former owner had realized.

Petitioners attempted to explain their wealth after 1946 by a story, on its face a test of credulity, that they had for decades had a hoard of undeposited cash amounting to $104,000 by 1933 and $113,000 by 1946. The story was proved to be false.

On the detailed evidence sketched briefly here, there was an overwhelming showing from which reasonable men could surely have been convinced beyond a reasonable doubt that petitioners had wilfully attempted to evade taxes by underreporting their taxable income. Petitioners' attacks on the verdict amount only to assertions that they could conceivably have been innocent. Such assertions fall far short of supporting their claim that the issue should not have been submitted to the jury.

IV

The instructions of which petitioners complain present no basis for reversal.

A. 1. The instruction petitioners requested on the requirements of proof by the net worth method was erroneous in at least three respects and was properly refused. The instructions actually given on this problem were wholly adequate. The trial court stated the elements of the offense, the presumption of innocence, and the Government's burden of proof beyond a reason-

able doubt. In addition, the court explained at length the nature of net worth proof and of circumstantial evidence in general. As the court below observed, these instructions presented the problem to the jury with "commendable clarity" (R. 351).

2. There is no basis for the contention, not raised by objection in the trial court, that the discussion of petitioners' cash board explanation narrowed the case to this single issue and shifted the burden of proof. In fact, this issue was central at the trial, on the theory of the defense as well as the prosecution. It was necessary and proper, therefore, to define the issue carefully. Cf. *United States* v. *Johnson, supra,* at 516. Nevertheless, all other possible issues were covered, the elements of the offense were fully stated, and the fact that the burden of proof was wholly on the Government was emphasized throughout.

3. Similarly not raised in the trial court, petitioners' objection to the instruction defining "reasonable doubt" is not meritorious. There is no formula for such a definition; the jury may be told generally that a reasonable doubt should be one with a rational basis rather than one grounded merely in whim or speculation. The instructions here met the test. The subtle distinction petitioners propose between what the trial court said and what they believe he should have said (but cf. *Dunlop* v. *United States,* 165

U. S. 486, 499–500) was not apparent to their counsel in the trial court when objection could and should have been made. The trial court's failure to adhere to this distinction could hardly have prejudiced their case before the jury.

B. The instructions on circumstantial evidence were proper. They followed the great weight of authority in the federal courts. See, *e. g.*, Learned Hand, J., in *United States* v. *Becker*, 62 F. 2d 1007, 1010 (C. A. 2). Having explained fully the character of circumstantial evidence, the presumption of innocence, and the necessity for proof beyond a reasonable doubt, the trial judge was not required to add the redundant charge that, because the proof was circumstantial, it had to exclude any reasonable hypothesis of innocence.

C. The trial judge was not required to read to the jury the statute under which the offense was charged. It was sufficient that he stated both the issues determining guilt or innocence and the elements of the offense.

ARGUMENT

I

INTRODUCTORY

This is one of four cases in which the Court has granted review of questions arising from convictions for wilful attempts to evade taxes

where the Government's proof has consisted of circumstantial evidence centering on the defendants' annual increases in net worth and other expenditures.[13] As we have noted elsewhere (see Briefs for the United States in *Friedberg* v. *United States*, No. 18, pp. 22–24, and in *United States* v. *Calderon*, No. 25, pp. 16–17), the nature of the crime in such cases—invariably comprised of fraud, concealment, and distortion—commonly makes impossible direct proof of the transactions giving rise to the alleged unreported income and attempt to evade tax.[14] It has frequently been necessary, therefore, to proceed by (1) showing annual expenditures by the defendant (reflected in increases in net worth or established by other proof of dispositions of wealth) far in excess of reported income and (2) proving in addition that these expenditures represent beyond a reasonable doubt unreported taxable income rather than non-

[13] In this case, as in *Friedberg* v. *United States*, No. 18, and *Smith* v. *United States*, No. 52, the convictions were affirmed by the Courts of Appeals (for the Sixth and First Circuits, respectively), and certiorari has been granted on petitions by the defendants. In *United States* v. *Calderon*, No. 25, the conviction was reversed by the Court of Appeals for the Ninth Circuit, and certiorari has been granted on the Government's petition.

[14] For example, out of 708 such cases referred to the Department of Justice for prosecution in the three-month period ending March 15, 1953, slightly more than half were believed to warrant prosecution on the basis of circumstantial evidence rather than direct evidence of specific items of unreported income.

taxable receipts or prior accumulations. The general propriety of such proof, however sufficient or insufficient may be the particular evidence in any particular case, has been affirmed by this Court (*United States* v. *Johnson*, 319 U. S. 503) and by numerous decisions of the Courts of Appeals.[15]

In one sense, however, it is perhaps unfortunate that such cases, though they admittedly present factual problems of a special nature, have been tagged with a special label, as "net worth" cases. The result—reflected, we think, in the cases now before the Court—has been attempts by defendants to single out these prosecutions and apply to them peculiar rules which have no application in other criminal prosecutions. It is urged in the instant case, for example (Pet. Br. 16), that there is no "specific statutory basis * * * for the use of the so-called net worth expenditures method of computing income." Petitioners argue from this that the kind of circumstantial evidence employed against them could not be used; but there is, of course, no general rule of criminal law requiring statutory authority for a particular form of evidence, provided only that it be relevant and otherwise competent.

Similarly, there runs through the claims of defendants in these cases an unspoken assumption that in proving unreported income as the source

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[15] See cases collected in our briefs in *Friedberg* (pp. 22-23) and *Calderon* (pp. 17-18, fn. 5).

of net worth increases, the Government is obliged to negate beyond the possibility of speculation any other conceivable source. But proof to a mathematical certainty is nowhere required in the criminal law, and it is not required to establish tax evasion. *United States* v. *Johnson, supra,* at 518. Petitioners misstate the Government's position when they suggest (Br. 23, 24, 25) (1) that we rely "upon net worth computations as the *sole proof* in a tax evasion prosecution", (2) that the Government "commonly *assumes* the nonexistence of all assets except those which are visible to its investigators," (3) that the Government "[predicates] a starting point upon assumption," (4) that "the burden is shifted to the taxpayer to prove that he did not in fact understate his taxable income", and (5) that it is "the Government's position that increases in net worth must be *assumed* to be attributable to currently taxable income, unless the taxpayer demonstrates the contrary." (Emphasis added.) Underlying these general charges, we think, is the premise that unless the Government's proof leaves no room for the ingenuity of counsel to suggest possible inferences other than those the jury drew, the evidence is insufficient to sustain a verdict of guilty. Cf. *Hopt* v. *Utah,* 120 U. S. 430, 439–440. We propose to show in this case (*infra,* pp. 40–67) that, apart from this erroneous premise, petitioners' attacks upon the verdict are un-

substantial. What we emphasize in this general introductory statement is that the standards by which such attacks are to be judged are the settled standards of the criminal law.

We also emphasize that the Government makes no claim that "assumption" may take the place of proof. If in a particular case the Government's proof fails, the case should not go to the jury. If only "assumptions" underlie a jury's verdict, the verdict must not stand. We urge only that no unfounded assumptions inhere in the nature of so-called "net worth" cases any more than in other kinds of criminal prosecutions. And we argue specifically here that convincing inferences reasonably drawn from the evidence by a jury, and approved by two courts, are not to be rejected as "assumptions" because counsel for the defense failed to persuade that other inferences were warranted by the evidence.

II

THE USE OF THE "NET WORTH" METHOD OF PROOF WAS PROPER

Acknowledging that they made no such argument in either of the courts below (Br. 22, fn. 4), petitioners contend that the Government could not rely upon a showing of net worth increases in this case in proving that they had wilfully attempted to evade taxes (Br. 14–22). This is so, they argue, because no specific error or misstate-

ment was shown in their books and records (Br. 15–16) and because Section 41 of the 1939 Internal Revenue Code (*supra*, p. 3) requires the Commissioner to adhere to the taxpayer's "method of accounting" unless this method "does not clearly reflect the income * * *." The argument—in the course of which petitioners intermingle and confuse bookkeeping accuracy, methods of accounting, and the nature of circumstantial evidence—is clearly without merit.

It should be observed at the outset that this argument has nothing to do with the *sufficiency* of the Government's proof, a matter considered separately both in petitioners' brief (pp. 22–47) and here (*infra*, pp. 40-67). What they assert, rather, is that the type of circumstantial evidence the Government adduced, however powerful, could not be used at all without first showing either a specific error or false statement in their books or some failure of their "method of accounting" to reflect income clearly. We may assume, therefore, for purposes of this point, that the evidence was beyond question sufficient to show annual net worth increases far in excess of reported income and to show that the excess resulted from unreported taxable income. Putting the question this way, as we think it is fairly put, states at once petitioners' fallacy.

For the whole point of the Government's case was that petitioners' books, on the basis of which

their returns were made, were false. The Government's agents were unable to determine directly the specific false statements in petitioners' books; no more could their accountant, who kept their books and made their returns from figures petitioners gave him, discover if and when these figures were false. *Supra*, pp. 10–11. It was impossible, for example, to recover the cash register tapes Mrs. Holland destroyed daily (*supra*, p. 10), or to know what sums might have failed to find their way into the cash register, or to learn the amounts petitioners removed from their receipts for personal expenses without making records of such withdrawals (*supra*, p. 10). Nevertheless, what the proof ultimately established was that petitioners had unreported income and that the only reasonable source of such income was the hotel profits which, according to petitioners' returns, fell dramatically following their acquisition of the hotel. *Supra*, pp. 8–10; *infra*, pp. 47–48. To argue that such proof could not be presented without first pointing precisely to the particular false statements in petitioners' books goes beyond the untenable suggestion "that skilful concealment is an invincible barrier to proof." *United States* v. *Johnson*, *supra*, at 518. The argument says in effect that the most obvious, common, and expectable kind of concealment must either be demonstrated by frequently unobtainable direct evidence or else not demonstrated at all.

There is no basis for such a contention. There is no formula in the criminal law which forbids the use of circumstantial evidence without specific statutory authorization.[16] And petitioners err in their belief that such a formula, specially applicable to prosecutions for tax evasion, is to be found in Section 41 of the Internal Revenue Code of 1939.

Section 41 offers a taxpayer, within certain limitations, a choice of annual accounting periods "(fiscal year or calendar year, as the case may be)" and a choice of accounting methods (cash, accrual, completed contract, etc.). The choice of period serves to determine the twelve-month period for which income is to be computed; the choice of method, geared to the nature of the taxpayer's business, determines the point in time as of which specific items of income and deduction are to be computed. See Sections 42 (a) and 43, Internal Revenue Code of 1939, *supra*, pp. 3–4; Section 29.41–1, Treasury Regulations 111, *supra*, pp. 5–6. The provision is designed to accommodate the system of tax computation to the practices and methods of business which fairly determine

[16] Truth may be established just as solidly by circumstantial evidence as by direct. In each case the determination depends, not upon the type of evidence, but upon its convincing quality. *United States* v. *Becker*, 62 F. 2d 1007, 1010 (C. A. 2); *McCoy* v. *United States*, 169 F. 2d 776, 784–786 (C. A. 9), certiorari denied, 335 U. S. 898; 1 Wigmore, *Evidence* (3d ed.), Secs. 25–26; 9 *id.*, Sec. 2497; 2 Wharton, *Criminal Evidence* (11th ed.), Sec. 926.

when and how taxable income is realized."[17] Where the taxpayer chooses an accounting basis which is not suitable for reflecting clearly when his income or deductions are realized—not suitable, that is, even though the taxpayer's books and returns tell no lies—the Commissioner is necessarily empowered to insist upon an appropriate basis. But the important fact remains that "method of accounting" as used in Section 41

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[17] The language of Section 41 is identical with that used in successive Revenue Acts since the Act of 1918, Sec. 212, 40 Stat. 1057, 1064–1065. Similarly, Sections 8 (g) and 13 (d) of the Revenue Act of 1916, 39 Stat. 756, 763, 771, provided that generally an individual or corporation "keeping accounts upon any basis other than that of actual receipts and disbursements" might make returns "upon the basis upon which his [its] accounts are kept, in which case the tax shall be computed upon his [its] income as so returned." In *United States* v. *Anderson*, 269 U. S. 422, 440, this Court explained the purpose of these provisions as follows:

"A consideration of the difficulties involved in the preparation of an income account on a strict basis of receipts and disbursements for a business of any complexity, which had been experienced in the application of the Acts of 1909 and 1913 and which made it necessary to authorize, by departmental regulation, a method of preparing returns not in terms provided for by those statutes, indicates with no uncertainty the purpose of §§ 12 (a) and 13 (d) of the Act of 1916. It was to enable taxpayers to keep their books and make their returns according to scientific accounting principles, by charging against income earned during the taxable period, the expenses incurred in and properly attributable to the process of earning income during that period; and indeed, to require the tax returns to be made on that basis, if the taxpayer failed or was unable to make the return on a strict receipts and disbursements basis."

(or "basis of keeping accounts" as used in corresponding sections of previous revenue acts)—

> refers to the general bookkeeping system followed by the taxpayer *and not to the accuracy or propriety of mere individual items or entries upon the books.* And *to correct an improper item in a return—whether the result of mere error or designed—cannot properly be said to constitute rejection of the basis upon which the return was constructed.* [*United States* v. *American Can Co.*, 280 U. S. 412, 419. Emphasis added.]

Whatever his "method of accounting," a taxpayer has a "net worth" at any given time and makes expenditures from time to time. It calls for no change in his method of accounting to determine at particular points and for particular periods the amount of his net worth, the increases or decreases therein, and the amounts he has spent. And the ultimate purpose of such determinations in a prosecution like the one here is to find whether a crucial improper item (understated taxable income) has appeared in the taxpayer's return—a process which, in the language of the *American Can* case quoted above, "cannot properly be said to constitute rejection of the basis upon which the return was constructed."

To be sure, it may be important in a particular case that there be no departure from the taxpayer's method of accounting in computing his

net worth as of any particular date. Thus, a taxpayer on the accrual basis may realize income at a given point in time which would not be income until a later point in time if he were on the cash basis. It would follow that the taxpayer's net worth would include or exclude the particular item at the particular time depending upon his "method of accounting." But this caution serves only to emphasize that, with any "method of accounting," computations of net worth can be and are made without changing that method. There is no suggestion that, in the only sense which could possibly matter here, there was any departure from petitioners' method of accounting which could have affected the accuracy of the computation of their net worth increases and other expenditures. Indeed, not only is the supposed obstacle of Section 41 presented for the first time in this Court, but petitioners at the same time concede (Br. 45) that, apart from their arguments as to the completeness of the assets shown at the starting point, there was "no dispute as to the fact or amount of subsequent expenditures or acquisitions."

The short of the problem is this: The Commissioner, to whom Section 41 refers and who is not a party to criminal prosecutions, makes no change in a defendant's "method of accounting" when a prosecution for tax evasion proceeds by proving net worth increases derived from unreported in-

come. The taxpayer's method of accounting in such a case may suit his business perfectly, and there may be no justification for changing it. The ultimate fact to be demonstrated is that, employing a method which is ideal *qua* method, the taxpayer has falsely stated the facts. Section 41 has reference, not to methods of proof in criminal cases, but to the various recognized basic "methods of accounting"—*e. g.*, cash, accrual, or installment—used in computing tax liability. Cf. *Healy* v. *Commissioner*, 345 U. S. 278, 281; *Dixie Pine Co.* v. *Commissioner*, 320 U. S. 516, 518–519; *Security Mills Co.* v. *Commissioner*, 321 U. S. 281; *Lucas* v. *American Code Co.*, 280 U. S. 445. Nothing in this Section had the purpose or result of limiting the long recognized and frequently indispensable method of proving net worth increases as part of the proof of underreported taxable income. Accordingly, notwithstanding contrary views expressed principally in dicta to which petitioners refer (Br. 17–21), the Tax Court, whose authority petitioners invoke (Br. 20–21), has recently answered their contention as follows (*Lipsitz* v. *Commissioner*, 21 T. C. 917):

> The net worth method is not a system of accounting; it is not a substitute for either the cash or the accrual basis of accounting or any other recognized method of keeping books. When correctly applied to the facts of a particular situation it is merely evi-

> dence of income. And when the increase in net worth is greater than that reported on a taxpayer's returns or is inconsistent with such books or records as are maintained by him, the net worth method is cogent evidence that there is unreported income or that the books and records are inadequate, inaccurate, or false. It is not correct to say that the use of the net worth method is forbidden where the taxpayer presents books from which income can be computed, for the net worth method itself may provide strong evidence that the books are unreliable.

See also *Potson* v. *Commissioner*, 22 T. C. No. 111.

III

THE VERDICT, SUSTAINED BY BOTH COURTS BELOW, WAS AMPLY SUPPORTED BY THE EVIDENCE

Summarized in broad outline, the evidence showed that on April 1, 1946, the petitioners acquired a hotel, bar, and restaurant business which had been producing greater profits than they reported from it; that, contrary to the decline he reported in his income tax returns, the petitioner Marion L. Holland admitted that the earnings of the business increased after petitioners purchased it; and that during each year of the period 1946–1948 the amounts spent by the petitioners in acquiring assets and making other nondeductible expenditures were substantially in excess of their

reported net income. It was shown that the profits they reported from the hotel business were one-eighth to one-quarter as great as those the former owner had realized. And the evidence established that the excess of their expenditures over their reported income, if added to the profits they showed for their hotel business, would make those profits close to, though still lower than, those the business had produced just prior to their acquisition of it.

Confronted with these discrepancies, petitioners explained them with a story of a hoard of currency amounting to $104,000 by 1933 and $113,000 by 1946—constantly growing over three decades, hauled about in a suitcase or a canvas bag, never invaded (until the commencement of expenditures on a grand scale in 1946) to ease the pinch of poverty or to satisfy even the smallest demands of creditors. In careful detail, this sworn explanation accounted with striking precision for the $81,000 by which their expenditures for 1946 through 1948 had exceeded their reported income. By what the petition for certiorari describes (p. 21) as a "wealth" of evidence, the explanation—which, if true, would have excluded any other—was demonstrated to be false.

Here, the bulk of petitioners' argument (Br. 22–47) is devoted to asserting that the case should not have gone to the jury. Primarily, they maintain (Br. 33–44) that the proof was insufficient

because it did not negate (1) the possibility that the $81,000 by which their expenditures exceeded their reported income for 1946–1948 might be attributable to their having had assets not accounted for at the beginning of 1946 (the starting point), or (2) the possibility that this large sum represented nontaxable receipts during the period. We treat both of these aspects together; both are part of the single question whether underreporting of current taxable income was proved; both are answered by the overwhelming evidence that petitioners' huge expenditures could reasonably be explained only by such income—and not by the cash hoard they claimed or by gifts or inheritances which they did not claim but implicitly excluded by their explanation. Petitioners' remaining arguments on the sufficiency of the evidence—that their admissions were insufficiently corroborated, that wilfulness was not proved, and that their acquittal for 1946 and 1947 somehow impairs their conviction for 1948—are equally without merit. They wholly fail to overcome the "assuring strength" (*Delaney* v. *United States*, 263 U. S. 586, 590) with which the concurrence of both lower courts arms the jury's verdict against them.[18]

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[18] See also, on the test to be applied in determining the sufficiency of the evidence, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80; *Gorin* v. *United States*, 312 U. S. 19, 32.

A. *There was convincing proof that petitioners had underreported current taxable income in large amounts*

In the net worth-expenditures computation the Government presented to the jury on the basis of the evidence, petitioners were given credit at the starting point, December 31, 1945, for $31,803.09 in assets—including (1) $29,650 representing the cost value, according to petitioners' income tax return for 1946 (R. 239), of stocks they owned at that time and sold prior to their purchase of the hotel on April 1, 1946, and (2) $2,133.09, representing the total balance in their two bank accounts (Appendix, *infra*, p. 89). Deducting from this total undisputed liabilities of $12,650.50, petitioners were shown to have a net worth of $19,152.59. It is also undisputed (Pet. Br. 45) that the net worth and expenditures figures shown for the subsequent years were correct. It followed, if the starting point was accurate, that receipts of some kind during the years 1946 through 1948 would account for some $81,000 realized by petitioners in excess of their reported income ($31,000) for that three-year period.

It is obvious, of course, that the solidity of the proof of starting point can be shaken only if the existence of assets in substantial amounts was insufficiently disproved by the Government. For it must be acknowledged that the investigators could not reach back and trace every penny in petitioners' pockets at some point in the past,

so that proof of attempted tax evasion could never be accomplished by the type of evidence here employed if it were necessary to establish with absolute precision the amount of taxes evaded. But there is no such necessity. See *United States* v. *Johnson, supra.* And the evidence here demonstrated convincingly that petitioners' large expenditures in excess of reported income from 1946 through 1948 did not come from undiscoverable assets in their possession before 1946.[19]

As we have noted (*supra*, pp. 13–16), petitioners made several statements, including written statements under oath, in which they undertook to explain fully their proved affluence after their entry into the hotel business in 1946 by asserting that they had accumulated a secret store of currency amounting to $104,000 by 1933 and $113,000 by 1946. It was wholly reasonable that the Government's investigation—ordinarily depend-

[19] Of course, the limitation we recognize upon the precision of net worth proof is to some extent eliminated by its operation on the ending point as well as starting point. For example, petitioners stated that after their acquisition of the hotel, they kept in their cash registers and safe amounts of cash ranging up to $5,000 (R. 81, 98, 305, 324, 325–326). These amounts would for meticulous precision have to be added to the net worth increases. However, they could not be determined precisely and were omitted altogether from the Government's computations, an omission obviously favorable to petitioners. Similarly, amounts petitioners spent to support themselves—for food, clothing, etc.—would be nondeductible expenditures and would enhance the excess of their expenditures over their reported income. But these, too, were wholly excluded, no attempt being made to estimate them, an additional factor in petitioner's favor.

ent upon the taxpayer's disclosures for at least the initial information upon which to collect taxes and enforce the tax laws (*Spies* v. *United States*, 317 U. S. 492, 495)—should center on this explanation, which would end the case if true and point persuasively to guilt if false. The results of that investigation served at once to prove that petitioners had lied and to show that their wealth in 1946–1948 could not be explained by undiscovered assets in their hands before 1946.

It was proved that, starting in the restaurant business in 1921, the petitioner Marion L. Holland, moving from one location to another, and incorporating and reincorporating when his obligations became too great or the suits against him too numerous, suffered a complete financial failure in December 1933, abandoning his entire business, which he had previously said was all he had, to creditors. It was shown that in 1937 or 1938, Holland told a bank cashier he had gone broke in the restaurant business, that he still had very little money, and that he would like to engage in some business ventures but lacked the funds to do so. In 1933, for an unpaid balance of $92.20, the Hollands had to suffer repossession of furniture they had bought on the installment plan; a compromise payment on a dairy bill dating from 1933 was not made until 1946; and a judgment of $506.66 for business rent remained unsatisfied from 1930 until 1950.

The human mind can grasp the *possibility* that, amid all these evidences of economic collapse, the Hollands were secretly clinging to a box or a bag containing $104,000 in cash, as they later asserted. But this reach of the imagination is no help to the petitioners. Twelve reasonable jurors were surely warranted in concluding beyond a reasonable doubt that there was no such hoard of wealth.

The evidence for the years 1933 to 1946 was equally overwhelming against petitioners. During those years, Mr. Holland moved from place to place, from job to job, at meager salaries, negotiating small bank loans from time to time. For seven of those years, while he worked in a far away city, Mrs. Holland remained in Denver, for reasons of economic advantage, working to provide a home for herself and her son. Neither the petitioners nor their corporations had paid any income taxes from 1913 to 1935; they paid such taxes only in small amounts from 1935 to 1946. The evidence for this later period powerfully confirmed the conclusion that there had been no cash hoard of $104,000 by 1933, and that there was surely no bag containing $113,000 by 1946.

The foregoing evidence, powerfully arguing that petitioners' explanations were false, was in itself cogent evidence of their guilt. *Wilson* v. *United States*, 162 U. S. 613, 620–621; *Andrews* v. *United States*, 157 F. 2d 723, 724 (C. A. 5),

certiorari denied, 330 U. S. 821; *United States* v. *Werner*, 160 F. 2d 438, 441 (C. A. 2); 2 Wigmore, *Evidence* (3d ed.), Sec. 278. But there was still further evidence that petitioners' net worth in fact increased remarkably from 1946 to 1948 and that this was not merely an apparent increase resulting from the disgorging of assets already owned before 1946, or an increase resulting from nontaxable receipts. As we have shown (*supra*, pp. 8–10), there was evidence that just before they acquired it, petitioners' hotel business was earning profits several times as great as those they reported. There was testimony that Mr. Holland had told the former owner the profits had increased after he took over. And it was shown that the difference between the income petitioners reported and the income the former owner had realized correlated strikingly with the difference between their reported income and their admitted net worth increases (and other expenditures) during the years 1946 to 1948 (*supra*, p. 12, fn. 8). To state this point graphically, we show here (1) the prior monthly earnings of the hotel business, (2) the monthly earnings petitioners would have required from this source (after eliminating net profits or losses they reported from other sources) to account for the assets they acquired and the other nondeductible expenditures they made during 1946, 1947, and 1948, and (3) the monthly

income they actually reported from this source (see pp. 8–13, *supra*):

Year	Prior Earnings	Amount of Income Which Would Explain Hollands' Expenditures	Hollands' Reported Income
1945	[1] $4,200		
1946	[2] 3,743	[2] $3,866	[2] $466
1947		2,748	450
1948		2,726	900

[1] Average monthly figure based on period of six months.
[2] Average monthly figure based on period of three months.
[3] Average monthly figure based on period of nine months.

These figures demonstrate vividly that profits as great in 1946 and substantially lower in 1947 and 1948 than the former owner's would fully explain petitioners' net worth increases for these years. The much smaller profits they actually reported stand in dramatic contrast. And this evidence, taken with the palpably false explanations petitioners tendered, added impressive weight to the conclusion that unreported income, not cash on hand at the starting point or current nontaxable receipts, explained their wealth during 1946, 1947, and 1948.

It was shown, finally, that many of petitioners' expenditures to acquire assets or reduce their indebtedness between the time they purchased the hotel and the end of 1948 were characterized by installment payments, indicative of a source of current income rather than a huge reservoir of cash available without the payment of interest. See *Barcott* v. *United States*, 169 F. 2d 929, 931 (C. A. 9), certiorari denied, 336 U. S. 912; *Sasser*

v. *United States*, 208 F. 2d 535, 538 (C. A. 5). Standing alone, this evidence might be relatively slight. Taken together with the other proof, it lent further conviction to the overall showing of petitioners' guilt.

To summarize, the evidence showed (1) undisputed acquisitions and expenditures by the petitioners in excess of their reported income, (2) the limited extent of petitioners' resources at the starting point, (3) the sufficiency of prior earnings of their hotel business—admitted subsequently to have increased rather than declined—to account for the acquisitions and expenditures, (4) a pattern of expenditure indicative of a source in current income, and (5) the falsity of an explanation attempted by petitioners—an explanation which implicitly excluded other conceivable explanations. This evidence, we submit, fully answers petitioners' claim that the Government failed to establish a *prima facie* case. It supported compellingly the jury's finding that petitioners' wealth came from unreported income—not from prior accumulations and not from some unspecified nontaxable source never suggested by petitioners and tacitly excluded by their own statements.

Emphasizing the *possibilities* the evidence could never negate to an absolute certainty, petitioners overlook the overwhelming probability the Government affirmatively proved. They say they

could have had more assets at the starting point than the Government's investigation revealed (Br. 33–37); they might have had gifts or inheritances, they suggest (Br. 43), to account for their net worth increases; and they conclude from these suggestions (Br. 43–44) that "no justification exists for *assuming* that the asserted increases in net worth reflected taxable income, for creating a *presumption* to that effect or for shifting to petitioners the burden of proving that the increases in net worth were attributable to non-taxable sources." (Emphasis added.) But these characterizations of the Government's case fail utterly to diminish the strength of the positive showing we have summarized that petitioners had huge net worth increases, that their attempt to account for these by a cash hoard (not gifts or inheritances) was untruthful, and that there was a current source of taxable income, the earnings of which were evidently understated, which did account for the increases. Starting with a promise to show the Government's failure to make out a *prima facie* case, petitioners end only with an assertion that states of fact consistent with their innocence are imaginable, however extremely improbable. The answer to such a contention is clear.

> Out of the domain of the exact sciences and actual observation there is no absolute certainty. The guilt of the accused, in the majority of criminal cases, must necessarily be deduced from a variety of circum-

> stances leading to proof of the fact. Persons of speculative minds may in almost every such case suggest possibilities of the truth being different from that established by the most convincing proof. The jurors are not to be led away by speculative notions as to such possibilities. [*Hopt.* v. *Utah,* 120 U. S. 430, 439–440.]

The "speculative" and unsubstantial character of petitioners' attacks on the sufficiency of the proof of starting point and current taxable income (Br. 33–44) is readily revealed by reference to the specific details of which they complain. We treat these in the order of petitioners' argument.[20]

1. The general assertion that the starting point was not fixed "with reasonable certainty" (Pet. Br. 33–35) has been sufficiently treated. *Supra,* pp. 40–41, 43–49. Early in this discussion, petitioners quote (Br. 34) the third sentence of the special agent's answer in the following exchange on cross-examination (R. 84–85):

> Q. And during all these interviews that you have testified about, the Hollands were very cooperative weren't they, Mr. Bodley?
>
> A. The Hollands talked to us. The Hollands made their records available. The only question of cooperation which I have in my mind was whether they always told us the truth about their currency, or not.

[20] We omit at this point and deal below (pp. 61–64) with the argument in this portion of petitioners' brief (pp. 37–42) that their admissions were not corroborated.

Emphasizing the last two words "or not"—and finding similar phraseology in *Bryan* v. *United States*, 175 F. 2d 223, 226 (C. A. 5), affirmed on other grounds, 338 U. S. 552—petitioners find it "apparent that the Government failed to sustain the burden of proving the petitioners' net worth starting point with reasonable definiteness." What is more apparent, we submit, is that the quoted testimony, read in context, is only a polite statement that in view of petitioners' stories about their currency, there was a question in the agent's mind as to the extent of their cooperation. Surely, petitioners would have objected with vigor—and with justice—had the agent taken the occasion of this question about their "cooperation" to announce a belief that petitioners had lied to him. The significant point, at any rate, is simply that the sentence petitioners emphasize neither adds to nor subtracts from the wealth of evidence which serves to establish the starting point firmly.

2. It is suggested (Pet. Br. 9–10, 34) that the evidence established petitioner Marion L. Holland's ownership on January 1, 1946, "of hundreds and possibly thousands of shares of stock (R. 29–30, 130–132, 141–142)." But the record, including the portions to which petitioners refer (see also R. 95, 129, 320) shows only that Holland, over the years dating back to 1937 or 1938, was engaged in buying and selling various stocks from

time to time—not, by any means, that he had on hand all the stocks he had ever owned (on margin) on January 1, 1946. On the contrary, petitioner Marion Holland himself stated (*supra*, p. 14) that he owned on January 1, 1946, stocks having a market value of about $45,000. He indicated, though he then said he was not certain, that he had sold all his stocks before purchasing the hotel on January 1, 1946. He acknowledged, further, in October of 1949 that he had not dealt in stocks since acquiring the hotel. His tax return for 1946 showed sales in February of that year of stocks for which he realized about $50,000, having a cost basis to him of $29,650.

The agent who had checked the brokerage houses gave testimony coinciding closely with Holland's statements, stating that Holland's stock on January 1, 1946, had a cost to him of around $26,000 or $27,000. It was shown that, whereas before February of 1946 Holland's bank loans were secured by stock, other assets were given as security thereafter. *Supra*, p. 16. Finally, petitioners reported dividends and interest in their income tax returns for the years 1944 and 1945, while no dividends were reported in the period 1946–1948 (R. 233, 241, 251, 287, 291).

From the foregoing evidence, the jury was certainly entitled to conclude, as the Government urged, that petitioner's 1946 return—coinciding with his statements, the results of the Govern-

ment's investigation, and the other evidence—told the whole story of his stock holdings on January 1, 1946. And the computation the Government proposed showed at cost as of January 1, 1946, the stocks revealed by that return to have been disposed of in February, 1946.[21] The accuracy of this showing was further confirmed by Holland's repeated assurance that cash on hand on January 1, 1946, not stocks, accounted for his affluence thereafter. If the directly pertinent evidence we have summarized could have left any doubt that the Government's computation correctly showed Holland's stock holdings on January 1, 1946, there can be no doubt that there were no stocks approaching in cost the amount necessary to shake the validity of the starting point.[22]

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[21] No question is raised, or could properly be raised, as to the propriety of showing the stocks at cost. At the end of 1946, it will be noted, the gain on the sale of these stocks is shown, excluding from the computation of allegedly unreported income the nontaxable portion of the gain. This makes evident the necessity for showing assets at cost throughout the computation. Otherwise, increments to net worth, unrealized for tax purposes, would distort the demonstration designed to contrast reported income with realized gains not reported (but properly reportable on the prosecution's thesis) as taxable income. Cf. pp. 37–38, *supra*.

[22] Petitioners quote (Br. 34) the special agent's testimony to the effect that Mr. Holland's "greater purchases [of stock] were still on hand in 1946" (R. 95), and refer to this as an "obvious defect" in the Government's proof of the starting point. What they omit is the testimony immediately following (*ibid.*) that these "greater purchases * * * still on hand" had a cost to Holland of $26,000 or $27,000. As we

3. Next, petitioners assert (Br. 35) as "[a]nother critical deficiency" in the Government's case the "failure to negative in any way the *possible existence* of a separate estate for the petitioner Ethel E. Holland." (Emphasis added.) This assertion, made in a single sentence, is briefly answered. The evidence left no doubt that the Hollands' assets were pooled; Ethel E. Holland and her husband both stated that any savings she accumulated were turned over to him and mingled with his savings (R. 79, 82, 302, 327).

4. It is argued, in addition (Pet. Br. 36), that the Government's investigation was deficient because the investigators did not check the truth of petitioner Marion L. Holland's statements that he had turned in gold for cash at the Government's call in 1932 and that he had made profits selling real estate in the twenties. Granting that it would be desirable to track to its conclusion

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have noted, these figures corresponded closely to those in Holland's 1946 return, which in turn conformed closely to Holland's subsequent sworn statements. And these statements were supported by other evidence that Holland divested himself of all his stock holdings early in 1946. All this firmly supported the figure of $29,650 for stocks on hand as of January 1, 1946.

We agree with petitioners that the remarks of the court below on this point (R. 347)—quoting and perhaps misled by the portion of the agent's testimony upon which petitioners rely—would not be an adequate answer if there were any such defect as they assert. But there is, for the solid evidentiary reasons we have summarized, no need to rely on this answer to support the jury's verdict.

every conceivable line of inquiry, the limited and trivial "defects" counsel were able to suggest only testify to the thoroughness of the investigation. Marion Holland's statements about gold and real estate referred to matters before 1932. The first indictment year was 1946. There was overwhelming evidence, including his own contemporaneous statements, that Marion Holland was broke in 1933 and in straitened circumstances for years thereafter.

Moreover, the jurors had before them petitioners' statements and the acknowledgment that the few details now in question had not been checked. For what they were worth, these factual matters were presented for the appraisal of the triers of fact along with all the others. The obvious point about these matters is that the jury could have believed Holland had gold in 1932 [23] and dealt in real estate in the twenties and still have found the evidence conclusively probative of the vital fact that he had nothing like the $113,000 in cash he claimed to have had at the outset of 1946. It is to this point, of course, that petitioners direct their claim "that the Government's

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[23] The amount of this gold, conceding its existence, is a matter of some doubt. In Holland's written statement in the record (R. 309), he merely said he had had "quite a bit of it." Though he was apparently referring to this statement (see R. 86), defense counsel put his questions on this subject variously in terms of "ten or twenty thousand dollars" of gold and then "twelve thousand dollars in gold" (R. 86–87).

investigation was defective." It is plain, we submit, that the asserted defects present no grounds for the argument that the Government's case should not have gone to the jury.

5. The argument (Pet. Br. 36–37) that the extensive evidence of the petitioners' financial history is too speculative and conjectural to be of value brings into sharp focus the effort to show ultimately that tax evasion must be immune against detection and proof by circumstantial evidence. Bizarre on its face (though not, to be sure, impossible), petitioners' story that they carried $104,000 in hidden cash in 1933 and $113,000 in 1946 was obviously not subject to disproof by direct evidence. The investigators could not reach back in time to hunt for the secret boxes and bags and suitcases of which the story told. Now petitioners assert that no trust should be placed in the objective proof, including Marion Holland's statements long before the investigation, that no such hoard could have existed. If the argument were sound, a large number of investigations would begin and end with the taxpayer's bland assurance that he'd had a huge bag of money or a mattress stuffed with cash at some convenient time in the past.

That the argument is unsound is attested by the great number of cases in which evidence of the kind adduced here has served as part of the

refutation of the "cash fund" hypothesis.[24] (There was, it should be recalled, other evidence on this point. Pp. 8–10, 21–23, *supra*. Here, we deal only with the specific attack on the evidence of financial history). It is no answer to say, as petitioners do (Br. 37), that the evidence of their history should have found them penniless at the end of 1945 rather than enjoying the net worth of almost $20,000 the Government showed. Nor is there any inconsistency between the historical events the Government proved and the fact that Holland, after 1933 (R. 95), bought and sold stocks on margin and apparently made some money. Like the history, the evidence of petitioners' net worth at the end of 1945 and of Holland's stock dealings were before the jury. If it was surprising, on all the evidence, that petitioners had amassed a net worth of $20,000 by 1946, it was incredible that they should have had in addition a bag of $113,000 in cash. The jury so found. Its finding is unassailable.

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[24] *E. g., Smith* v. *United States*, 210 F. 2d 496, 500 (C. A. 1), certiorari granted, 347 U. S. 1010, No. 52, this Term; *Pollock* v. *United States*, 202 F. 2d 281, 284 (C. A. 5), certiorari denied, 345 U. S. 993; *Gariepy* v. *United States*, 189 F. 2d 459, 461–462 (C. A. 6); *United States* v. *Potson*, 171 F. 2d 495, 498 (C. A. 7); *Schuermann* v. *United States*, 174 F. 2d 397, 399 (C. A. 8), certiorari denied, 338 U. S. 831; *Barcott* v. *United States*, 169 F. 2d 929, 931–932 (C. A. 9), certiorari denied, 336 U. S. 912; *Graves* v. *United States*, 192 F. 2d 579, 584 (C. A. 10).

6. We return briefly to the argument (Pet. Br. 42–44) that there was no proof, passing now the problem of the starting point, that unreported taxable income was the source of the net worth increases. We have reviewed sufficiently the evidence from which the jury, contrary to petitioners' view, was entitled to find that unreported income from the hotel business was the answer. *Supra*, pp. 8–10, 21–23, 43–51. We reemphasize only the fallacy in petitioners' efforts to accentuate the negative. The proof relating to the hotel business showed taxable income—not gifts or inheritances or tax-free bonds—as the source of the increases. Petitioners' explanations said in so many words, "The whole answer is a store of cash we had in 1946." That explanation and the demonstration of its falsity also ruled out gifts, inheritances, etc. In a word, the Government proved *affirmatively* petitioners' receipt of unreported taxable income. That proof inevitably carried with it the negations petitioners demand. To prove that X killed the victim is to prove that Y or Z did not. But nobody supposes that every murder case must contain evidence specifically and expressly negating the guilt of other possible murderers. No more is it essential in every case of attempted tax evasion that an agent testify in so many words that he could find no gifts or inheritances.

Petitioners acknowledge (Br. 25–26) that there was no such specific evidence in *United States* v.

Johnson, 319 U. S. 503, and attempt to explain that case on the ground that there "an undisclosed source of taxable income was discovered." Here, however, while the source of their income was not undisclosed, there was evidence entitling the jury to find that the source was a far richer one than petitioners had reported it to be. And the problem is one of fact, not of law. There is no rule that gifts and inheritances need not be expressly negated where an "undisclosed source" is found, but must be when an "understated source" is found. It was enough in *Johnson* that the jury was justified in finding an undisclosed source (see 319 U. S. at 516–517); it is enough here that the jury was similarly justified in finding a source which, though disclosed, was falsely represented.

It remains *conceivable*, though their elaborate explanations belied the possibility, that petitioners had gifts or inheritances or other tax-free receipts sufficient to account for their large net worth increases. But this is all. In such circumstances, we submit, the Government has made a case for the jury without undertaking to supply proof of all the negatives counsel can suggest. Cf. *Rossi* v. *United States*, 289 U. S. 89, 91–92; *United States* v. *Fleischman*, 339 U. S. 349, 360–361; *Morrison* v. *California*, 291 U. S. 82, 88–91; *Casey* v. *United States*, 276 U. S. 413, 418; *Yee Hem* v. *United States*, 268 U. S. 178, 185; *Wilson*

v. *United States*, 162 U. S. 613, 619. Information as to unknown or secret gifts or inheritances was peculiarly within petitioners' knowledge and could readily have been suggested by them either in their elaborate explanations before trial or in the specific evidence they would almost surely have had at the trial. To take this position is in no sense to shift the burden of proof, as petitioners continually complain has been done. Petitioners were of course entitled to propose as a reasonable doubt the possibility (incredible on this record) that they had had gifts or inheritances. Where they err is in the claim that, without proof directed specifically to the negation of this possibility, and despite the clear evidence affirmatively showing unreported taxable income, the Government failed to establish a case sufficient for the jury.

B. *Petitioners' exculpatory statements, which required no corroboration, were in any event amply corroborated*

In written statements, signed under oath, petitioners undertook to explain to the Government's investigators the apparently suspicious circumstances surrounding their tax returns. If true, the explanations completely absolved them of liability. Thus, the statements bear no resemblance to confessions. And there is no remote suggestion that these declarations, preceded by clear warnings and statements of petitioners' constitutional

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rights, were in any way involuntary or improperly induced.

In these circumstances, the rule requiring corroboration of confessions has no meaningful application. The danger against which that rule guards—the danger of "errors in convictions based upon untrue confessions alone" (*Warszower* v. *United States*, 312 U. S. 342, 347)—is wholly absent here. Petitioners would never have come to trial, no less have been convicted, on their statements alone.

In the Government's brief in *Opper* v. *United States*, No. 49, pp. 25–45, the point stated in the foregoing paragraph is argued at length. Urging that point as sufficient to dispose of the corroboration issue here, we respectfully refer the Court to that brief.

In still another pending case (*United States* v. *Calderon*, No. 25), the Government's brief (pp. 16–31) presents the argument that an admission which (though not exculpatory) does not itself acknowledge guilt or any element of an offense need not be corroborated by independent evidence of the specific fact admitted. There again, our point is that such an admission, however damaging it may turn out to be when combined with other facts proving the crime, is also outside the reason for the corroboration rule. We note further that such an admission, since it establishes no element of the *corpus delicti*, is necessarily ac-

companied by independent proof of each element of the *corpus delicti* if the evidence is sufficient to convict. Because independent proof of these elements (not necessarily proof beyond a reasonable doubt) satisfies the most stringent version of the corroboration rule, the rule is at best a redundancy, as applied to such admissions. That position is also applicable to petitioners' contention that their admissions as to the starting point were not corroborated. If our argument on the evidence preceding and following the present discussion—i. e., the argument that the evidence sustains the verdict—is correct, it follows that there was independent evidence of every element of the *corpus delicti,* since none of those elements was established by petitioners' admissions alone. Leaving the details of this point to our brief in *Calderon,* we turn to the third and independently decisive answer: petitioners' admissions as to the starting point were adequately corroborated.

Without repeating our detailed statements of the evidence, the corroborative proof may be briefly summarized. Evidence of petitioners' financial history, testimony by special agents who had independently investigated the facts (*e. g.,* the facts as to Holland's stock holdings), other testimony as to Holland's stock dealings, and his prior tax returns, all tended to prove the facts he admitted as to assets other than cash on hand

at the starting point.[25] In addition, the evidence that petitioners' undisputed net worth at times after the beginning of 1946 was attributable to unreported income during those times further corroborated the petitioners' statements in so far as these statements, stripped of the false explanation, admitted a net worth of under $20,000 at the starting point.[26] The foregoing evidence—extensive in its details though briefly stated—was sufficient corroboration of petitioners' statements bearing on the starting point.

C. Wilfulness was established

Petitioners assert (Br. 44) that "not one single item of evidence was introduced to justify submission of the case to the jury on the question of willfulness." The assertion is mistaken. The evidence, if sufficient in other respects, showed a consistent pattern of underreported income in large amounts; it showed conscious filing of false returns; and it showed a persevering sense of culpability demonstrated by the attempted false explanations. There was ample basis for inferring

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[25] This independent proof included admissions by Holland himself made years before the offense charged. No corroboration was required for such admissions. *Warszower* v. *United States*, *supra*.

[26] Of course, the Government's task was to refute, not to corroborate, the assertions as to cash on hand. There is for obvious reasons no suggestion that these assertions should have been corroborated.

the kind of knowing, purposeful wrongdoing "wilfulness" describes. Cf. *Spies* v. *United States*, 317 U. S. 492, 500.[27]

D. *The acquittal for 1946 and 1947 cannot impair the conviction for 1948*

Recognizing "that inconsistency of jury verdicts is not a matter for reversal" (Br. 45), petitioners indicate that it was extraordinary for the jury in this case to have found them not guilty for 1946 and 1947 and guilty for 1948. We submit, however, that if there is anything extraordinary about the verdict, it is merely the jury's failure to find petitioners guilty for 1946 and

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[27] Though they make no complaint against the instructions on the issue of wilfulness in their arguments on the instructions (Br. 47–58), petitioners add under the present point an observation (Br. 44) that "The evidential deficiency in this respect is spotlighted by the trial court's instruction on the question of wiilfulness (R. 215)." They then proceed to quote and criticize as "the trial court's instruction" only part of the instructions on this question. Beyond the point where petitioners' quotation ends there are two additional paragraphs of instruction on wilfulness, the second of which includes the following (R. 215–216):

"* * * The court instructs you, as I have already told you, one of the essential elements of a crime is wilfullness. The Government charges and the indictment charges that these defendants knowingly and wilfully attempted to defeat and evade. The term 'wilfulness,' Ladies and Gentlemen, is best defined as a state of mind of the taxpayer wherein he is actually aware of the existence of the tax obligation to the Government, which he seeks to deceive. A wilfull evasion of the tax requires an intentional act or omission, as contrasted with an accidental, inadvertent, or innocent one."

1947. Nothing petitioners suggest warrants departure here from the controlling principle petitioners profess to accept, for other cases. The separate counts marked separate offenses; the fact that the attempted evasion charged appeared to be part of a steady pattern extending over the three years is no reason for insisting that the acquittal for two years could justify reversal of the guilty verdict for the third. It is, of course, this apparent pattern which gives rise to whatever apparent inconsistency there may be in the verdict. But the result is no more offensive to logic, and no less within the domain of the jury's secret processes, than it is in other cases governed by the rule precluding reversal for inconsistency.

E. *The evidence sustained Mrs. Holland's conviction.*

This final point on the evidence, touched lightly by petitioners (Br. 46), warrants only a brief response. If, as we have shown, the evidence was sufficient against Mr. Holland, it was no less sufficient against his wife. They worked closely together during the prosecution years; she knew their business affairs intimately, shared in running the hotel business, filed a joint return with him for the year for which they were convicted, and joined in his false explanations. She was jointly and severally liable for the tax which she joined him in attempting to evade. Internal Revenue Code of 1939, Section 51 (b). On all

the evidence, the jury was justified in finding her guilty.

IV

THE TRIAL COURT'S INSTRUCTIONS PRESENT NO GROUNDS FOR REVERSAL

A. *Burden of proof*

Petitioners contend that the trial court did not properly instruct the jury on burden of proof because (1) it refused to give a requested instruction on the requirements of proof by the net worth method, (2) it limited and shifted the burden of proof, and (3) it incorrectly defined "reasonable doubt" (Br. 47–54).

1. The first of these contentions—that petitioners' requested instruction should have been given—is answered both by the evident incorrectness of that request and by the thoroughly adequate instructions the trial court actually gave on the requirements of proof. It is settled that when a trial court gives all of the essential instructions, a defendant is not entitled to any additional instructions, even though appropriate, unless they are requested in proper form; it is not incumbent upon the court to reframe the proposed instructions if they are in need of revision. See *Caminetti* v. *United States*, 242 U. S. 470, 495.

Although the trial court not only instructed the jury on the elements of the offense charged, the presumption of innocence, and the burden of proof (R. 212–213; 215–216), but also explained,

at some length, the nature of the net worth method of proof in particular and of circumstantial evidence in general (R. 208–211), the petitioners now urge (Br. 47–49) that the trial court erred in refusing to give one of the two instructions which they requested on the nature of the net worth method of proof. (See Instructions 11 and 15, R. 227–228, 229–230.) This instruction (quoted at Pet. Br. 48), as requested, was erroneous for at least three reasons. *First*, it stated that the Government was required to produce evidence that excluded *all possible* available sources of *taxable* income from which the increased net worth and the excess expenditures could have been derived (R. 229). This would in effect have told the jury that the Government was required to prove that no crime had been committed. But, aside from the absurd effect resulting from use of the word "taxable" rather than "nontaxable," the Government was merely required to establish circumstances from which reasonable jurors could find that the possibility of nontaxable income being the explanation of the net worth increases and excessive expenditures had been disproved beyond a reasonable doubt. Cf. *United States* v. *Johnson*, 319 U. S. 503, 517–518; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80; *Gorin* v. *United States*, 312 U. S. 19, 32. *Second*, the requested instruction stated

that the jury should return a verdict of not guilty if they had a reasonable doubt whether the Government in its net worth computation had omitted assets of the defendants, on December 31, 1948, the ending point (R. 229–230). An omission of that nature, however, would have furnished no basis for a not guilty verdict since such an omission would have been in the defendants' favor. Cf. note 19, p. 44, *supra*. *Third*, the requested instruction stated that the jury should return a verdict of not guilty if they had a reasonable doubt whether the Government had omitted assets of the defendants on January 1, 1946, the starting point, further stating that one of the essential elements that the Government must establish was that the defendants had *no* assets on that date other than those which the Government contended they had (R. 229–230). An omission of assets from the starting point, December 31, 1945, would have constituted a crucial deficiency, however, only if the omission was so substantial as to have had a significant effect upon the amount of income shown by the computation to have been underreported; it was not necesary for the Government to prove the exact amount of unreported income. *United States* v. *Johnson*, 319 U. S. 503, 517. In the form requested, the proposed instruction on net worth was, therefore, properly denied.

2. Petitioners made no objection in the trial court like their objection here (Br. 49–52) that the

trial court, in its discussion of petitioners' statements that they had had $113,000 in undeposited cash by 1946, limited the Government's burden to mere refutation of these statements. Their failure to object when they should have not only precludes their contention here (Rule 30, F. R. Crim. P.); it serves also to point up the fact that the instructions in question, coinciding precisely with the theory petitioners themselves had pressed, were entirely appropriate. Moreover, petitioners are in error when they assert that these particular instructions should be read alone as stating the exclusive "total effect" (Br. 49) of all the instructions; the charge as a whole made clear that the refutation of their cash fund story was by no means sufficient in itself to convict.

From their opening statement to the jury, devoted almost exclusively to a promise to show a cash hoard, through their examination of the Government's witnesses, to their closing arguments (*supra*, p. 23), petitioners' counsel emphasized the plain fact that this attempted explanation was crucial in the case. Since, unless the starting point could be shaken, the fact and amount of petitioners' subsequent expenditures and acquisitions were undisputed (Pet. Br. 45), and since the explanation implicitly denied any other possible explanation, the emphasis by both prosecution and defense on this point was perfectly understandable. In defense counsel's lan-

guage at the trial, it was clear that the starting point was "the cornerstone of this case" (R. 186). It is true, of course, that petitioners were not being tried for a crime of failing to have a cash hoard; it was equally true that the principal defendant in *United States* v. *Johnson*, 319 U. S. 503, was not being tried for owning gambling resorts. Nevertheless, just as in *Johnson* "The decisive issue of fact was whether Johnson's relation to these resorts was that of a patron or of a proprietor" (319 U. S. at 516), so here, as the Court of Appeals observed (R. 351), "the ultimate and precise issue in the case was whether they [the jury] believed beyond a reasonable doubt from the established circumstances that there was no such fund in existence on January 1, 1946."

However, while this was true as a matter of practical fact, the trial court's instructions were not limited to the presentation of this decisive issue. The charge stated all the elements of the offense alleged, the presumption of innocence, and the Government's burden of proving each element beyond a reasonable doubt (R. 212–213; 215–216). And in the very portion of the instruction to which petitioners tardily object here, the court said (R. 213):

> If you believe, Ladies and Gentlemen of the Jury, and are satisfied beyond a reasonable doubt that the Government's evidence that Mr. Holland and Mrs. Holland did not

manner, we submit, the jury was properly instructed "as to the law with respect to the particular situation before it" and no doubt was left as to the circumstances under which a crime could be "found to have been committed." *Graham* v. *United States*, 187 F. 2d 87, 90 (C. A. D. C.), certiorari denied, 341 U. S. 920.

CONCLUSION

The judgment of the Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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> have that cash fund, *or any other source of the money with which they increased their net worth except the gross receipts of this business in the taxable years in question,*[28] then you should bring in a verdict of guilty, *if you also find*, Ladies and Gentlemen of the Jury, *that they have proved to your satisfaction, beyond a reasonable doubt, all of the essential and material elements of the charges in this indictment.* [Emphasis added.]

Here, as throughout, the instructions were phrased in terms of the Government's burden of proof beyond a reasonable doubt; they afford no ground for the contention (Pet. Br. 51–52) that the trial judge shifted this burden. Nor was any such shift involved in the explanation of the vital cash fund issue. As we have noted, the failure to suggest this in the extensive objections to the instructions in the trial court (R. 218–222) reflects a recognition that it was necessary and

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[28] The petitioners refer (Br. 51, fn. 17) to the Government's reliance on this phrase in its brief in opposition and draw a distinction between gross receipts, on the one hand, and net receipts plus depreciation, on the other. This phrase was pointed out in the Government's brief in opposition to show that the trial court instructed the jury that in order to convict they must be satisfied beyond a reasonable doubt that the petitioners' net worth increases not only did not result from use of the alleged prior accumulation of cash (the real issue) but also did not result from the use of nontaxable receipts from any other source (a mere speculative possibility). No issue was raised in the courts below or in this Court which suggests any pertinence of the technical distinction between gross receipts and net receipts plus depreciation.

proper for the trial judge to treat the cash hoard issue at some length. That tacit acknowledgment and the sufficiency of the burden of proof instructions as a whole defeat the new argument raised here.

3. A further objection not presented in the trial court is the contention (Pet. Br. 52–54) that the trial court erred in a portion of its instructions defining reasonable doubt. The argument is addressed to the sentence we italicize in the following passage from the instructions (R. 217):

> When I say that the Government must bring before you evidence which satisfies your minds beyond a reasonable doubt, the court does not mean that you should understand that the Government has the burden of satisfying you beyond every doubt, to remove every doubt, leaving no doubt at all. What we are talking about is a doubt based upon reason and common sense, in the exercise of your intelligence. It is a substantial doubt, not a trivial doubt; a significant doubt, not a flimsy one; a real doubt, and not an imaginary one. *It's the kind of doubt, Ladies and Gentlemen of the Jury, which you folks in the more serious and important affairs of your own lives might be willing to act upon.* Now if you feel such a doubt about the Government's case, it is your duty to acquit them.

It is, of course, recognized as essential in a criminal case that the jury be instructed that

they are to reach a verdict of guilty only if the evidence satisfies them of the defendant's guilt beyond a reasonable doubt. However, since the term "reasonable doubt" is in itself simple and generally comprehended, attempts further to explain it "do not usually result in making it any clearer to the minds of the jury." *Miles* v. *United States,* 103 U. S. 304, 312; *Dunbar* v. *United States,* 156 U. S. 185, 199. Accordingly, a further explanation to the jury of the meaning of the term "reasonable doubt" is not ordinarily of vital importance, *Hopt* v. *Utah,* 120 U. S. 430, 440, and, when given, is not required to follow any fixed or inflexible formula. *Dunbar* v. *United States, supra; United States* v. *Schireson,* 116 F. 2d 881, 883 (C. A. 3); 9 Wigmore, *Evidence* (3d ed.), Sec. 2497. It is generally held to be sufficient if the jury is given to understand that a reasonable doubt is one having a rational basis rather than one depending merely upon whim or speculation. *United States* v. *Klock,* 210 F. 2d 215 (C. A. 2), certiorari denied, 347 U. S. 960; *Williams* v. *United States,* 208 F. 2d 447 (C. A. 5), certiorari denied, 347 U. S. 928; *United States* v. *Farina,* 184 F. 2d 18 (C. A. 2), certiorari denied, 340 U. S. 875; *Murphy* v. *United States,* 33 F. 2d 896 (C. A. 3), certiorari denied, 280 U. S. 584.

Taken as a whole, the trial court's explanation of reasonable doubt in the instant case met the

standard. Perhaps, as an abstract matter, the sentence petitioners extract would have been better had it been phrased in terms of a doubt leading to a *hesitation to act* rather than a doubt leading one *to act*. Even this is questionable in view of this Court's declaration long ago that a jury should not be told "to set up any other standard of judgment than that which influenced them in the ordinary business of life." *Dunlop* v. *United States*, 165 U. S. 486, 500.[29] What is most important,

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[29] In the *Dunlop* case, the following instructions were claimed to be erroneous (p. 499):

"'It is your duty to come to a conclusion upon all those facts, and the effect of all those facts, the same as you would conscientiously come to a conclusion upon any other set of facts that would come before you in life.' 'There is no technical rule; there is no limitation in courts of justice, that prevents you from applying to them (the facts and circumstances in evidence) just the same rules of good, common sense, subject always, of course, to a conscientious exercise of that common sense, that you would apply to any other subject that came under your consideration and that demanded your judgment.'"

Rejecting the argument, this Court said (pp. 499–500):

"There was no error in these instructions. One of the main objects of a jury trial is to secure to parties the judgment of twelve men of average intelligence, who will bring to bear upon the consideration of the case the sound common sense which is supposed to characterize their ordinary daily transactions. If cases were to be decided alone by the application of technical rules of law and evidence, it could better be done by men who are learned in the law and who have made it the study of their lives; and while it is entirely true that the jury are bound to receive the law from the court, and to be guided by its instructions, it by no means follows that they are to abdicate their common sense, or to adopt any different proc-

however, is that the point petitioners stress is at best a relatively subtle and abstruse concept. Viewing the whole charge on reasonable doubt, there is no reason to suppose that the jury was led to exercise an erroneous judgment on the sufficiency of the evidence, or that its verdict could have been influenced by the language to which petitioners now except.

Support for this conclusion is found in the fact that petitioners interposed no objection on this ground in the trial court. If on so basic a question as reasonable doubt the distinction they now find vital was likely to affect the jury significantly, it is reasonable to suppose the point would have

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esses of reasoning from those which guide them in the most important matters which concern themselves. Their sound common sense brought to bear upon the consideration of testimony, and in obedience to the rules laid down by the court, is the most valuable feature of the jury system and has done more to preserve its popularity than any apprehension that a bench of judges will wilfully misuse their power. To construe these instructions as authorizing the jury to depart from the rules of evidence and to decide the case upon abstract notions of their own, or from facts gathered outside of the testimony, is hypercritical. They were simply told to come to a conclusion upon the facts that had been proven, and to apply to those facts the same rules of good sense that they would apply to any other subject that came under their consideration and demanded their judgment. In these remarks the court gave a just and accurate definition of their functions. It certainly would have been error to have told them to apply to the facts proven any other rules than those which their good common sense dictated, or to set up any other standard of judgment than that which influenced them in the ordinary business of life."

been noticed by counsel and raised when there was opportunity to do something about it. As is frequently the case, the tardiness of their complaint casts doubt on its substance; it is in addition, of course, a sound reason for refusing to consider the problem at all. Rule 30, F. R. Crim. P.

B. *Circumstantial evidence*

The petitioners challenge the adequacy of the instructions on circumstantial evidence in general and assert that the trial court erred in refusing to give an additional, requested instruction to the effect that, where the Government's evidence is circumstantial, it must be such as to exclude every reasonable hypothesis other than that of guilt.[30] (Br. 54–56.)

The instruction on circumstantial evidence in general was clearly adequate. After summarizing the theories of both the prosecution and the defense, the trial court pointed out that the Government's evidence of attempted tax evasion was circumstantial, since it purported to establish unreported taxable income by proof of increases in net worth and proof that the only reasonable

[30] Actually, in their written instructions the petitioners sought to have the jury instructed not merely that circumstantial evidence must be such as to remove from their minds any *reasonable* hypothesis of innocence (R. 227), but also that it must be such as to remove from their minds "*every* hypothesis, save that of his or her guilt" (R. 228, emphasis added).

source of such increases was current, taxable income from the petitioners' hotel, bar and restaurant business (R. 208–210). He then said to the jury (R. 210):

> What is the nature of circumstantial evidence? It is your province, Ladies and Gentlemen of the Jury, in resolving these issues to determine what evidence you will believe, and what you think it proves to your satisfaction, beyond a reasonable doubt. You may, in arriving at your conclusions, look at the facts which are in proof in this record. And you may do something more than that. You may, Ladies and Gentlemen, a good cross section of the citizenry of this state, use your common sense and your intelligence, and you may ask yourselves what inferences reasonably may be drawn from the circumstances which you think are established by this proof.

He further illustrated the nature of circumstantial evidence by pointing out the different inferences which the prosecution and the defense had argued the jury should draw from the fact that the petitioner Marion L. Holland was a successful speculator in the stock market (R. 210–212). The jurors were repeatedly told that the evidence must be sufficient to establish guilt beyond a reasonable doubt before they could convict. (R. 207, 210, 212, 213–214, 215, 216, 217.) They were specifically instructed (R. 215):

> It is not necessary for the Government to offer direct proof of any elements of this

> offense. It is enough if you are satisfied beyond a reasonable doubt by the circumstantial evidence in this case in making your decision and arriving at your verdict.

Finally, with respect to the ultimate inference which the Government asked the jury to draw regarding the one crucial issue in the case as well as with respect to all essential elements of the offense charged, the trial court told the jury (R. 213):

> If you * * * are satisfied beyond a reasonable doubt * * * that Mr. Holland and Mrs. Holland did not have that cash fund, or any other source of the money with which they increased their net worth except the gross receipts of this business in the taxable years in question, then you should bring in a verdict of guilty, if you also find * * * that they have proved to your satisfaction, beyond a reasonable doubt, all of the essential and material elements of the charges in this indictment.

According to the great weight of federal authority, where, as here, a jury is instructed on the presumption of innocence and the Government's burden of proving its case beyond a reasonable doubt, the additional, requested instruction that the evidence, if circumstantial, must exclude every reasonable hypothesis of innocence is not only unnecessary but is also either redundant or—to the extent it would indicate that different degrees of proof are required for direct and cir-

cumstantial evidence—misleading.[31] This was first pointed out by Judge Learned Hand in *United States* v. *Austin-Bagley Corp.*, 31 F. 2d

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[31] A different formula from that requested by petitioners, namely that the jury should acquit if the circumstances are as consistent with innocence as with guilt, has been discussed in several cases. In the old case of *Garst* v. *United States*, 180 Fed. 339, 343, never since cited with approval, the Fourth Circuit held that such an instruction should be given. A dictum to the same effect in *Gurera* v. *United States*, 40 F. 2d 338, 340 (C. A. 8), has likewise never been cited with approval. In *McLendon* v. *United States*, 13 F. 2d 777, 779, the Sixth Circuit held that the usual instruction on the presumption of innocence and reasonable doubt was sufficient, although it was said to be better practice to tell the jury that they should acquit the defendant if the circumstances were as consistent with innocence as with guilt.

The only federal cases we have been able to find which clearly require a specific instruction that circumstantial evidence must be such as to preclude every reasonable hypothesis except that of guilt are two old cases in the Fifth Circuit, neither of which has ever been cited with approval, and one recent case in the Sixth Circuit. The Fifth Circuit cases are *Anderson* v. *United States*, 30 F. 2d 485, and *Stutz* v. *United States*, 47 F. 2d 1029. The Sixth Circuit case is *Hanson* v. *United States*, 208 F. 2d 914, 916. The Sixth Circuit's opinion, in *Hanson* relies upon cases dealing with the quantum of evidence necessary to go to the jury, not with instructions—cases which actually show that the "reasonable doubt" and "reasonable hypothesis" formulas are equivalents. See p. 83, *infra*. And the Fifth Circuit in *Beckman* v. *United States*, 96 F. 2d 15, has tacitly abandoned its earlier holding and quoted with approval portions of opinions of the Second and Eighth Circuits to the contrary. For the confusion in state court decisions, see 1 Randall, *Instructions to Juries* (1922 ed.), Secs. 226–235; 3 *id.*, Sec. 1983; 1 Branson, *Instructions to Juries* (3d ed., 1936), Secs. 65–66; 5 *id.*, Sec. 3327; Note, 89 A. L. R. 1379.

229, 234 (C. A. 2), certiorari denied, 279 U. S. 863, and a few years later the same judge criticized the *Garst*, *Anderson* and *Stutz* cases (*supra*, note 31, p. 80) in the following language (*United States* v. *Becker*, 62 F. 2d 1007, 1010 (C. A. 2)):

> The requirement seems to us a refinement which only serves to confuse laymen into supposing that they should use circumstantial evidence otherwise than testimonial. All conclusions have implicit major premises drawn from common knowledge; the truth of testimony depends as much upon these, as do inferences from events. A jury tests a witness' credibility by using their experience in the past as to similar utterances of persons in a like position. That is precisely the same mental process as when they infer from an object what has been its past history, or from an event what must have preceded it. All that can be asked is that the importance of the result to the accused shall demand a corresponding certainty of his guilt; and this is commonly and adequately covered by telling them that the conclusion shall be free from fair doubt. To elaborate this into an inexorable ritual, or to articulate it for different situations, is more likely to impede, than to promote, their inquiry.

Other federal decisions following this view include: *Corbett* v. *United States*, 89 F. 2d 124 (C. A. 8); *Stryker* v. *United States*, 95 F. 2d 601, 604 (C. A. 10); *United States* v. *Valenti*,

134 F. 2d 362, 364 (C. A. 2), certiorari denied, 319 U. S. 761; *United States* v. *Spagnulo*, 168 F. 2d 768, 770 (C. A. 2), certiorari denied, 335 U. S. 824; *McCoy* v. *United States*, 169 F. 2d 776, 784–786 (C. A. 9), certiorari denied, 335 U. S. 898; *Samuel* v. *United States*, 169 F. 2d 787, 791 (C. A. 9); *Himmelfarb* v. *United States*, 175 F. 2d 924, 942 (C. A. 9), certiorari denied, 338 U. S. 860; *United States* v. *Kemble*, 197 F. 2d 316, 320 (C. A. 3); cf. *United States* v. *Dolasco*, 184 F. 2d 746, 748 (C. A. 3); *United States* v. *Augustine*, 189 F. 2d 587, 591 (C. A. 3). Eminent text writers have offered the same criticism of the specific instructions desired by petitioners. See 1 Wigmore, *Evidence* (3d ed.), Secs. 25–26; 9 *id.*, Sec. 2497; 2 Wharton, *Criminal Evidence* (11th ed.), Sec. 926.

The essential similarity between proof beyond a reasonable doubt and proof which eliminates any reasonable hypothesis of innocence is shown by this Court's opinion in *Allen* v. *United States*, 164 U. S. 492, 500, and by the cases petitioners invoke (Br. 55–56) describing the quantum of evidence required to take a case to the jury (not the proper words to include in instructions).[32] In

[32] These cases include: *Epstein* v. *United States*, 174 F. 2d 754 (C. A. 6) (one of two cases of a similar nature relied on by the Sixth Circuit in the *Hanson* case, *supra*, note 31, p. 80); *Strickland* v. *United States*, 155 F. 2d 167 (C. A. 5); *Cross Co.* v. *Simmons*, 93 F. 2d 482 (C. A. 8); *Eierman* v. *United States*, 46 F. 2d 46 (C. A. 10); *Montgomery* v. *United*

Allen, this Court held that where an instruction on presumption of innocence and the Government's burden of proving its case beyond a reasonable doubt had been given, the trial court properly refused to repeat that charge in effect by giving a requested instruction that where there is a probability of innocence, there is a reasonable doubt. Likewise, the learning to which petitioners refer defining evidence sufficient to submit a case to a jury reinforces the view that the concept of excluding any reasonable hypothesis of innocence is essentially the same as the concept of proof beyond a reasonable doubt. The quantum of sufficient evidence is adequately defined either way; the verbal formulas are interchangeable. See, *e. g.*, *Curley* v. *United States*, 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari denied, 331 U. S. 837.

We submit, in sum, that it was clearly enough that the trial court explained fully the character of circumstantial evidence, the presumption of innocence, and the Government's burden of proof beyond a reasonable doubt. The court properly

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States, 203 F. 2d 887 (C. A. 5); *United States* v. *Fenwick*, 177 F. 2d 488 (C. A. 7); and *Bryan* v. *United States*, 175 F. 2d 223 (C. A. 5), affirmed, 338 U. S. 552, rehearing denied, 338 U. S. 957. In *Pollock* v. *United States*, 202 F. 2d 281 (C. A. 5), certiorari denied, 345 U. S. 993, and *Banks* v. *United States*, 204 F. 2d 666 (C. A. 8), certiorari denied, 346 U. S. 857, order denying certiorari vacated and case restored to docket, 347 U. S. 1007, the trial court gave the instructions requested by the defendants.

refused to add the instruction—at best redundant, at worst confusing—that, because the Government's proof was circumstantial, it was required to exclude any reasonable hypothesis of innocence.[33]

C. Statutory basis of the crime

Petitioners' remaining contention (Br. 56–58) is that the trial judge, because he failed to read the applicable statute to the jury, did not properly instruct them on the statutory offense charged. The argument ignores the well-founded principle that the instructions need not follow any fixed form or adopt any prescribed language; the dispositive answer to the argument is that

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[33] In the foregoing argument we have assumed that the Government's case for each year of the indictment period was based solely on circumstantial evidence. Actually, however, this overlooks certain previously mentioned direct evidence, namely, the testimony of Mr. DeLue to the effect that in February, 1947, the petitioner Marion L. Holland stated that he had already earned more from the hotel, bar and restaurant business than his 1946 and 1947 returns show he reported. The instruction requested was not limited to the year 1948. Under such circumstances, the instruction, even if otherwise appropriate, was not required to be given. *Barshop* v. *United States*, 191 F. 2d 286, 292–293 (C. A. 5), certiorari denied, 342 U. S. 920; *Sloan* v. *United States*, 31 F. 2d 902, 906 (C. A. 8); *Portman* v. *United States*, 34 F. 2d 406, 408 (C. A. 8); *Carnahan* v. *United States*, 35 F. 2d 96, 104 (C. A. 8), certiorari denied, 281 U. S. 723; *Sullivan* v. *United States*, 32 F. 2d 992, 994 (C. A. 9); *McMillan* v. *United States*, 27 F. 2d 94, 96 (C. A. 8); 1 Randall, *Instructions to Juries* (1922 ed.), Secs. 226–227; 1 Branson, *Instructions to Juries* (3d ed., 1936), Sec. 65.

the trial judge properly stated, not only the issues determining guilt or innocence in this case, but the essential elements of the offense in general.

It is familiar law that a trial judge may properly use his own language in instructing the jury and is not required to state the terms of the statute under which the prosecution is proceeding. *Wright* v. *United States*, 175 F. 2d 384, 388 (C. A. 8), certiorari denied, 338 U. S. 873; *United States* v. *Quick*, 128 F. 2d 832, 835 (C. A. 3); *Downing* v. *United States*, 35 F. 2d 454, 456 (C. A. 9); *Aeby* v. *United States*, 206 F. 2d 296, 299 (C. A. 5), certiorari denied, 346 U. S. 885. Moreover, both eminent authority and logic support the position that an instruction on the crime charged is sufficient if it explains the issues determining guilt. Thus, in *United States* v. *Center Veal & Beef Co.*, 162 F. 2d 766, 771 (C. A. 2), Judge Learned Hand criticized the cases upon which the petitioners rely (Br. 57), as follows:

> It is true that the Third Circuit in three decisions, *United States* v. *Levy*, 3 Cir., 153 F. 2d 995; *United States* v. *Noble*, 3 Cir., 155 F. 2d 315; *United States* v. *Piacourt*, 3 Cir., 159 F. 2d 917, has held, where the crime was selling above the ceiling price, that it is necessary to explain the regulations to the jury, and that the judge's failure to do so vitiates the conviction, even though the defendant did not ask him to do so. Moreover, there is language in

> the books to the effect that the jury must always be told to "apply the law to the facts," and that it is not enough merely to tell them what issues of fact determine guilt. In *Morris* v. *United States*, 9 Cir., 156 F. 2d 525, there is an elaborate collection of these expressions. It is of course true that a jury has the power to acquit the accused, though they may believe that he is guilty; and that this is an inherent element in the system. Nevertheless, since admittedly it is their duty to accept the law as the judge gives it to them, we cannot understand what distinction there is, except one of mere form, between telling them what issues determine guilt, and what legal propositions they should apply to the evidence. The only conceivable difference, so far as we can see, is that the second method may be thought to give them a larger apparent latitude for disregarding the law and substituting their own notions of justice. We are extremely skeptical that it has even that effect; and we are not at the moment ready to assume that the encouragement of such a disposition is essential to the preservation of our liberties.

See also *United States* v. *Capitol Meats, Inc.*, 166 F. 2d 537, 539 (C. A. 2), certiorari denied, 334 U. S. 812.

Instructing even more fully than would be required by the principles stated in the foregoing quotation, the trial court in this case formulated

the issues determining guilt and explained the essential elements of the offense charged—namely, (1) an attempt to evade and defeat a tax by underreporting taxable income and (2) wilfulness. See *Spies* v. *United States*, 317 U. S. 492, 497–499. At the outset, the judge read the various counts of the indictment, which embodied the language of the statute, and stated the amounts of income taxes the defendants had allegedly attempted to evade (R. 205–206). After outlining the factual issues raised by both the defense and the prosecution, and describing the nature of circumstantial evidence (R. 208–212), the judge said (R. 212–213):

> The issue in this case is whether or not these defendants filed those income tax returns, reporting the income on those returns and the tax computed from it, knowingly and wilfully not including gross receipts from the business which the Government claims they earned, and which the Government claims they didn't report.

Thereafter, the judge pointed out the essential element of an attempt to evade and defeat and the essential element of wilfulness, stated that some additional tax must be found to be due, and explained that petitioners could not be convicted unless the jury found beyond a reasonable doubt that they had wilfully attempted to evade a substantial part of that tax (R. 215–216). In this

APPENDIX

MR. AND MRS. M. L. HOLLAND

Item	NET WORTH				Witness and citation
	Dec. 31, 1945	Dec. 31, 1946	Dec. 31, 1947	Dec. 31, 1948	
ASSETS					
U. S. National Bank Checking Account M. L. Holland	$2,064.18	$10,169.63	$130.70	$439.50	Davis, R. 24.
Montana Nat'l Bank, Jt. Account	88.91	12.70	12.70		Ferguson, R. 32.
First Nat'l Bank, Golden	0	6,988.80	5,888.41	7,663.16	Fortune, R. 32–33.
Stock—20th Century-Fox	20,650.00	0	0	0	Cost and disposition per 1946 return, R. 239.
Stock—Midland Steel	9,000.00	0	0	0	Cost and disposition per 1946 return, R. 239.
Hotel	0	72,750.00	72,750.00	72,750.00	De Lue, R. 34–35—Discount 5% or $2,250, R. 37.
Coffee Shop	0	15,000.00	15,000.00	15,000.00	De Lue, R. 35 (also per return, R. 235).
Equipment (So. Equipment Co.)	0	0	0	7,965.00	Dorsey, R. 42; Ex. E, R. 158, 263.
Equipment (Carson Crockery)	0	0	0	4,283.44	Reed, R. 45; Ex. F, G, H, R. 158, 263.
Improvements—F & F—Hotel and Coffee Shop	0	3,904.56	19,353.60	38,851.97	Per depreciation schedules, returns, R. 235, 243, 253.
Horses	0	0	1,000.00	1,000.00	Craig, R. 46–46.
House 815 13th Street, Golden	0	10,000.00	10,000.00	10,000.00	Landry, R. 46–47.
Five lots 10th Street, Golden	0	3,000.00	3,000.00	3,000.00	Larned, R. 53–54.
Strip of Land Blk. 32, Golden	0	0	500.00	500.00	Waters, R. 55.
Barn—building material	0	0	0	1,742.24	Davison, R. 58–60.
160 Acre Tract, Golden	0	0	0	6,000.00	Davison, R. 59, 60. Ex. I, J, K, R. 263–264.
1500 Ford Street, Golden (frame apt. and improvements)	0	0	9,085.00	9,825.00	Dulaigh, R. 155–156.
Inventory—Hotel and Coffee Shop	0	1,300.00	2,247.05	2,460.00	Per 1946, 1947 and 1948 returns, R. 235, 243, 253.
Total Assets	31,803.09	123,125.69	138,967.46	181,480.37	

MR. AND MRS. M. L. HOLLAND—Continued

Item	NET WORTH				Witness and citation
	Dec. 31, 1945	Dec. 31, 1946	Dec. 31, 1947	Dec. 31, 1948	
LIABILITIES					
Outstanding checks	0	$3,976.90	$8,835.82	$6,622.08	Garvin, R. 157-158.
U. S. Nat'l Bank	$11,703.84	25,000.00	15,000.00	0	Davis, R. 24-25.
Leonard De Lue	0	10,000.00	0	0	De Lue, R. 35.
Fred Landry	0	4,000.00	0	0	Landry, R. 46-47.
Carl Larned	0	2,975.00	0	0	Larned, R. 53-54.
Golden Savings & Loan Assn	0	0	3,431.39	2,409.04	Rose, R. 63.
T. C. Hitchings & Son	0	0	0	25,000.00	Hitchings, R. 68.
New York Life Insurance Co	446.00	0	0	0	Voight, R. 102.
Olson Investment Co	506.66	506.66	506.66	506.66	Thode, R. 112, Horowitz, R. 139.
Depreciation	0	2,651.45	7,746.45	14,604.68	Per returns, R. 235, 243, 245, 255.
Total Liabilities	12,650.50	49,110.01	35,520.43	49,142.46	
Net Worth	19,152.59	74,015.68	103,447.03	132,337.91	
Net Worth Increase		54,863.09	29,431.35	28,890.88	
Add—Nondeductible Expenditures:					
Federal income taxes paid:					
In Colorado		1,500.00	3,487.00	768.69	Hoeft, R. 21.
In Montana		302.00	178.70		R. 295, Ex. BB and CC.
Life Insurance premiums:					
Security Life & Accident Co				2,609.50	Aregood, R. 100.
New York Life Insur. Co		745.85	693.60	692.65	Voight, R. 101-102.
Total (Net Worth Increase plus Nondeductible Expenditures)		57,410.94	33,790.25	32,961.72	
Deduct—Nontaxable income:					
Nontaxable capital gain		10,968.44			Per return, R. 239.
Income tax refund				914.56	Hoeft, R. 21.
Reconstructed Net Income		46,442.50	33,790.25	32,047.16	
Reported		15,336.93	5,717.57	10,211.42	R. 235-A, 247, 257.
Unreported		31,105.57	28,072.68	21,835.94	